①

Supreme Court, U.S.
FILED

01 1753 MAR 26 2002

No. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES BENNINGTON,

Petitioner,

v.

CATERPILLAR, INCORPORATED, a corporation doing business in the State of Illinois,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

William M. Anderson IV
Anderson Law Offices
625 South Main Street
Creve Coeur, Illinois 61610
Telephone: (309) 694-6250

Attorney of Record for Petitioner

154pgs

Questions Presented

Petitioner was subjected to an improper transfer, causing severe public humiliation and intolerable working conditions, creating a hostile work environment and resulted in a constructive discharge of petitioner in violation of the Age Discrimination in Employment Act. The district court found that petitioner *was* treated less favorably than other employees, however, because the employee that replaced petitioner was not more than ten years younger than petitioner, the court held that he was not substantially younger than petitioner.

The district court also held that petitioner failed to establish a claim for the intentional infliction of emotional distress. The district court found that petitioner presented enough evidence to show that he had suffered a materially adverse employment action, which is the basis for his claim for the intentional infliction of emotional distress and respondent never denied that their conduct was intended to cause distress.

It should also be noted that the U.S. Supreme Court is currently reviewing a case to determine whether older employees have the same legal clout as minorities in discrimination claims, which may also affect petitioner's claim.

The questions presented are:

1. Whether the court erred in requiring a 10 year age difference to prove a prima facie case of age discrimination and whether petitioner's claims of wrongful transfer, hostile work environment and constructive discharge, based on age discrimination, were sufficient to withstand respondent's motion for summary judgment;
2. Whether petitioner's common law claim for intentional infliction of emotional distress was sufficient to withstand respondent's motion for summary judgment; and
3. Whether the district court erred in refusing to reopen discovery.

TABLE OF CONTENTS

Question Presented i

Table of Contents ii

Table of Cited Authorities iii

Opinions Below 1

Statement of Jurisdiction 1

Statutory Provisions Involved 1

Statement of Case 2

Reasons for Granting the Writ 5

I. Age Discrimination Claim 5

II. Intentional Infliction of Emotional Distress 7

III. Refusal to Reopen Discovery 20

Conclusion 25

TABLE OF CITED AUTHORITIES

29 USC § 623 1

29 USC § 631 1

Federal Rule 30.1 of the local rules
of the United States District Court for
the Central District of Illinois 1, 22-24

Brown v. City of Aurora, 942 F.Supp.
375, 381 (N.D. Ill. 1996) 12

Campbell v. Fasco Indus., Inc., 861 F.Supp.
1385, 1390 & n.5 (N.D.Ill. 1994) 6, 7

C.f. Christensen v. Equitable Life Assur.
Society of United States, 757 F.2d 340,
343 (7th Cir. 1985) 13

Cole v. City of Milwaukee, Wisconsin,
516 U.S. 1078 (1995) 7

Doe v. R.R. Donnelly & Sons, Co.,
42 F.3d 439, 443 n.3 (7th Cir. 1994) 14

Hartley v. Wisconsin Bell, Inc.,
124 F.3d 887, 893 (7th Cir. 1997) 7

Harris v. Forklift Sys., Inc.,
510 U.S. 17, 23 (1993) 14

Holder v. Ivanjack, 39 F.Supp.2d 964,
969 (N.D. Ill. 1999) 17, 18

James v. Sheahan, 137 F.3d 1003,
1007 (7th Cir. 1998) 11

McDonnell Douglas Corp. v. Green,
411 U.S.792 (1973) 6

McGrath v. Fahey, 126 Ill.2d 78,
533 N.E.2d 806, 809 (1988) 18

Meritor Sav. Bank, FSB v. Vinson,
477 U.S. 57, 65 (1986) 14

Miller v.Champaign Community Unit Sch.
Dist. No. 4, 983 F.Supp. 1201, 1208,
(C.D. Ill. 1997) 11

Patterson v. Zerox Corp.,
901 F.Supp. 274, 278 (N.D. Ill. 1995) 17

Perdomo v. Browner, 67 F.3d 140,
145 (7th Cir. 1995) 11

Pitasi v. Gartner Group, 184 F.3d 709,
714 (7th Cir. 1999) 7, 10, 12, 16

Ransom v. CSC Consulting, Inc.,
217 F.3d 467, 468 (7th Cir. 2000) 6

Rickgauer v. Martin Marietta Materials, Inc.,
55 F.Supp.2d 899, 903 (C.D. Ill. 1999) 17

Robin v. Espo Eng'g Corp., 200 F.3d 1081,
1088-89 (7th Cir. 2000) 6

Rodgers v. Western-Southern Life Ins. Co.,
12 F.3d 668, 677 (7th Cir. 1993) 14

Schroeder v. Lufthansa German Airlines,
875 F.2d 613, 623 (7th Cir. 1989) 17, 18

Surowitz v. Hilton Hotels Corp.,
383 U.S. 363 (1966) 20

Venters v. City of Delphi, 123 F.3d 956,
975 (7th Cir. 1997) 14

Wilson v. Chrysler Corp.,
172 F.3d 500, 510 (7th Cir. 1999) 15

Zamudio v. Patla, 956 F.Supp. 803,
813 (N.D. Ill. 1997) 11

Zorn v. Helene Curtis, Inc., 903 F.Supp.
1226, 1249 (N.D. Ill. 1995) 14

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The district court's opinion (per Chief Judge Joe B. McDade) granting respondent's summary judgment motion (Appendix A-10 - A-26 ("Pet. App.")) is not published. The district court's subsequent opinion reaffirming that holding and denying petitioner's motion for reconsideration (Pet. App. A-54 - A-57) is not published. The court of appeals' opinion (per Chief Judge Flaum, joined by Circuit Judge Cudahy and Circuit Judge Manion) affirming (Pet. App. A-1 - A-9) is published at 275 F.3d 654.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and order on December 28, 2001. No petition for rehearing was filed. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of 29 U.S.C. §623 and 29 U.S.C. §631 relevant to this petition are reprinted in the Appendix at A-27 - A-33. Federal Rule 30.1 of the local rules of the United States District Court for the Central District of Illinois relevant to this petition is reprinted in the Appendix at A-33a.

STATEMENT OF THE CASE

Petitioner, James Bennington, date of birth, August 7, 1944, was an employee of Caterpillar, Inc. from the time of his discharge from the United States Army in 1965 until approximately May 6, 1998. James Bennington started out in the apprenticeship program in 1965 and received a steady stream of promotions, advancements and increasing management and supervisory duties during his years at Caterpillar, Inc. until approximately February of 1998. All of James Bennington's annual performance evaluations, including the very last one he received at Caterpillar, were good to excellent in nature. James Bennington never received anything approaching an unfavorable employment performance evaluation until the unwarranted negative alteration of his 1997 evaluation in December, 1997 or January, 1998, by Paul Wroblewski, a senior management employee who had little or no personal knowledge of Bennington's work over 1997.

In late 1997, Caterpillar determined that they desired to eliminate fifty managerial positions. Subsequently, James Bennington and several other elderly supervisory employees were placed in an empty building, given no official job duties, and were referred to as waste management. In addition, performance reviews were altered in some cases before and in at least one case after the performance reviews had already been through the "sign line" and placed in the employees' personnel histories changing their initial favorable evaluations to extremely unfavorable performance evaluations, without good cause. This changing of the performance evaluations effectively eliminated any potential for these employees of obtaining a different good job at Caterpillar and, more importantly, put their jobs in jeopardy and deprived the employees of the protections of the salaried employment security plan.

The Caterpillar Salaried Employment Security Plan (hereinafter referred to as "SESP") provides that "Management and salaried employees with unsatisfactory performance (as determined by the performance review process) and/or misconduct lose their SESP protection and are subject to demotion, disciplinary action or dismissal in accordance with applicable corporate and/or business unit practices."

In other words, James Bennington and the other elder employees were placed in a situation where they were in fear of being discharged from employment and losing over thirty years of accumulated pension benefits. Younger management employees, such as Mark Dubois, who is more than ten years younger than Bennington, were not subjected to this treatment.

James Bennington's immediate supervisor for the year 1997 prepared a very favorable review of James Bennington's work performance in 1997. Indeed, in June or July of 1997, James Bennington had been brought in to fix a commercial area production line which had fallen into trouble and, in fact, James Bennington did fix the problems with said production line. James Bennington's immediate supervisor, Jerry Holloman, to this day stands by the statement that James Bennington is "one of the best machine shop superintendents I had ever seen". James Bennington was a leader in providing leadership and teamwork cooperation skills and implementing new initiatives along these lines which were desired by Caterpillar. James Bennington was told "no one could have done it any better" from his immediate supervisor for his work in the 1997 commercial engine production problem. Bennington was also praised for his Crosby (Vision, Values and Teamwork) initiatives and for helping implement $240,000 in savings in 1997.

On or about late December, 1997 or early January, 1998, James Bennington's review was changed for no work related reason that his immediate supervisor can find. On or about February 9, 1998, James Bennington was told to clear out his desk and was moved down to waste management in an empty building. He was given no work to perform, placed on public display, succumbed to the humiliation and intolerable work conditions and potential loss of his approximately thirty-three years of accumulated pension benefits and retired from Caterpillar on or about May 6, 1998.

James Bennington filed the within actions against Caterpillar, Inc. on or about April 2, 1999. James Bennington's attorney, Dean Poignant, withdrew from the case and from the practice of law and Petitioner contacted Attorney William M. Anderson IV in October of 1999. Attorney William M. Anderson IV entered his appearance on behalf of Petitioner, James Bennington.

On July 13, 2000, the Honorable Joe McDade extended the discovery deadline in the within cause approximately 30 days to the date of August 14, 2000 at the request of Petitioner, herein, and over the objection of Respondent.

Attorney William M. Anderson IV received said decision of the Court on July 17, 2000 and immediately, that same date, sent correspondence to counsel for Respondent, repeating his written request of June 30, 2000 for a list of dates available to conduct discovery depositions and informing defense counsel of an approximately one week period when Petitioner would be out of the State of Illinois attending depositions in the State of Florida. On or about July 24, 2000, Laura Lindner, counsel for Respondent, informed counsel for Petitioner that the last possible day the Court had allowed for depositions, to wit: August 14, 2000, was the only date available for taking depositions. On August 4, 2000, Attorney William Anderson requested earlier dates or, in the alternative, an agreement to continue the discovery deadline. Attorney William Anderson's correspondence was delayed by his attendance of the previously mentioned depositions in Florida and finding that his secretary had unexpectedly quit employment upon his return from vacation, thus hampering the speed of which Attorney William Anderson was able to respond to the earlier correspondence. On August 7, 2000, Sefarth & Shaw again refused to give a specific date they would be available and informed Petitioner that they would be refusing to cooperate with any extension of discovery, stating only that "there is a chance we could be available on the morning of Wednesday, August 9 or possibly, Friday, August 11 . . . ", knowing full well that said dates and times were too late at that juncture for depositions to be arranged and leaving themselves an out if, in fact, they could have been arranged. Thus, Seyfarth & Shaw effectively delayed for the entire additional month that the Court had allotted for discovery, only allowing depositions to occur on the very last day of said discovery deadline in a sham attempt to appear to have cooperated in good faith with the discovery in this case.

The District Court, over the objection of Petitioner, closed discovery on August 14, 2000, denied Petitioner's Motion to Re-Open Discovery and granted Respondent's Motion for Summary Judgment on all counts.

James Bennington appealed the decision to the Court of Appeals.

On December 28,2001, the Court of Appeals affirmed the decision of the District Court.

This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

I. Age Discrimination Claim

It should first be noted that petitioner's case was dismissed after the district court granted respondent's motion for summary judgment. As such, the standard for review for all questions (other than the refusal to reopen discovery) was a *de novo* standard of review. Furthermore, when viewing the facts presented, all facts and inferences should be drawn in favor of the petitioner.

Petitioner has no direct proof of age discrimination. Therefore, the district court correctly held that he must prove his claim for age discrimination under the burden-shifting analysis established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Ransom v. CSC Consulting, Inc., 217 F.3d 467, 468 (7th Cir. 2000). Under the McDonnell Douglas burden-shifting analysis used in the indirect method of proof, the plaintiff must first prove, by a preponderance of the evidence, a prima facie case of the alleged discrimination. Ransom, 217 F.3d at 470. Once the plaintiff does so, a presumption of discrimination exists, which then shifts the burden to the defendant to present evidence of a legitimate, non-discriminatory reason for the adverse employment decision. *Id.* If and when the defendant does so, the presumption of discrimination disappears, and the burden shifts back to the plaintiff to show the reason(s) proffered by the defendant is (are) merely a pretext for unlawful discrimination. *Id.* Moreover, in the Seventh Circuit, a combination of direct and circumstantial evidence, none of which standing alone would be conclusive, may cumulatively present a "convincing mosaic of discrimination" by which the plaintiff can survive a motion for summary judgment. Robin v. Espo Eng'g Corp., 200 F.3d 1081, 1088-89 (7th Cir. 2000).

In order to prove a prima facie case under the ADEA, Bennington must demonstrate that (1) he was over 40 years old; (2) he was performing his job satisfactorily; (3) he suffered an adverse employment action; and (4) he was treated less favorably than other substantially younger, similarly situated employees. Ransom, 217 F.3d at 470. Moreover, in responding to a summary judgment motion, Bennington need only prove his prima facie case by a preponderance of the evidence. *See* Campbell v. Fasco Indus., Inc., 861 F. Supp. 1385, 1390 & n.5 (N.D. Ill. 1994) (there is a very low threshold to establish prima facie case), *aff'd*, 67 F.3d 301 (7th Cir. 1995), *cert. denied sub nom.* Cole v. City of Milwaukee, Wisconsin, 516 U.S. 1078 (1996).

Caterpillar only challenged the "substantially younger" portion of Bennington's prima facie case. Therefore, the other aspects of his prima facie case are deemed satisfied. Pitasi v. Gartner Group, 184 F.3d 709, 714 (7th Cir. 1999); Campbell, 861 F. Supp. at 1390.

As Caterpillar correctly points out, an age gap of 10 years is presumed to be "substantially younger" for ADEA purposes. Hartley v. Wisconsin Bell, Inc., 124 F.3d 887, 893 (7th Cir. 1997)). The Hartley court, however, did not foreclose the possibility that a lesser age gap would still satisfy the substantially younger aspect of an ADEA prima facie case: "In cases where the [age] disparity is less, *the plaintiff still may present a triable claim* if she directs the court to evidence that her employer considered her age to be significant. In that instance, the issue of age disparity would be less relevant." 124 F.3d at 893 (emphasis added); *see also id.* ("[T]he line we draw [the ten year age gap] is not so bright as to exclude cases where the gap is smaller but evidence nevertheless reveals the employer's decision to be motivated by the plaintiff's age.").

Also, although Caterpillar and the district court concentrated on the fact that Bennington was replaced by an individual who was only five years younger, Bennington had presented sufficient additional evidence to show that Caterpillar's decision to transfer him was motivated by age. In fact, in February, 1998, out of 100 managers in the Communicator Group, only Bennington, John Kamp and Jerry Siwicke were placed into "waste management". All employees placed in waste management were over fifty years old. Younger employees filled the old positions. Thus, a clear inference arises that age was a motivating factor for Murphy's decision to place Bennington in waste management.

In addition, only Bennington, Kamp and Siwicke had their performance evaluations changed from favorable to very unfavorable reviews. Bennington's performance review written by his direct supervisor (Jerry Holloman) was very favorable. However, after Holloman retired, Paul Wroblewski changed his performance evaluation without any justification whatsoever and in direct violation of Caterpillar's own policies. Wroblewski tried to justify his actions by stating that the changes were made as a result of Bennington failing to correct problems in the Commercial Assembly area. This allegation is completely without basis. In fact, Bennington offered proof that the problems Wroblewski was complaining of occurred *before* Bennington began supervising the area. Bennington was placed in the Commercial Assembly area to *correct* the problems that already existed. He did not cause the problems.

In May 1997, while Bennington was a Unit Manager, he went to speak with his immediate supervisor, Jerry Holloman, on his own volition. Although the two production lines that were Bennington's responsibility were in "good shape," he wanted to inform Holloman that certain other areas were in terrible condition and very behind schedule. Upon receiving this information, Holloman as factory manager, checked this out for himself and agreed with Bennington's assessment. Consequently, Holloman immediately assigned Bennington the responsibility of fixing that situation, and relieving him of his former responsibilities. Holloman gave Bennington the additional responsibility not because he caused the predicament, but rather because he knew Bennington was a highly competent manager who could correct the problem.

By the fall of 1997, Bennington had worked extremely hard and extremely long hours attempting to make his new areas "current." At that time, Dan Murphy, a Caterpillar vice-president, inquired when various buildings would be made current. When he did not receive the answer he wanted to hear, he "got very angry" and threatened that if you are not "current" by the date given, people are going to be fired. Notwithstanding the extreme demands put on him, Bennington made his sections current by Murphy's deadline and remained current for the remainder of the year. When Holloman retired at the end of that year, he wrote Bennington a very favorable final performance review and thanked him for a job well done, stating that "no one else could have done it better."

Upon Holloman's retirement in December 1997, Ray Shearer replaced Holloman as Bennington's immediate supervisor. Very soon after Holloman wrote the favorable review, Bennington was called into Shearer's office and shown Paul Wroblewski's changes to Holloman's review, which turned "the good review to a completely unacceptable performance-type review."

Holloman wrote the initial performance review because he was Bennington's immediate supervisor for close to three years and thus knew Bennington and his job performance better than Wroblewski did. Wroblewski was located in a different building and rarely observed Bennington or his job duties. He usually only had contact with Bennington at weekly staff meetings attended by approximately twenty mid level managers. Furthermore, if Wroblewski disagreed with Holloman's evaluation of Bennington, the "normal practice" would have been to inform Holloman before initiating any changes to the report. In this case, however, Wroblewski altered Holloman's review of Bennington without informing Holloman at all. Moreover, Bennington received a favorable mid year review from Holloman that was not challenged. Bennington presented testimony to the district court that these actions were in direct violation of Caterpillar's policies regarding performance reviews. Bennington also presented testimony from Holloman that Wroblewski's changes to Bennington's review were wholly unwarranted. Also of note is that Wroblewski's negative comments were the only negative review Bennington had received in his 30-plus years at Caterpillar.

Nevertheless, after being given a direct order to sign the altered review, Bennington spoke with Shearer about his job performance and now negative review. After Shearer stated that he was wholly satisfied with Bennington's performance, Bennington made it clear that he was very committed to his job and that he could do it better than anyone else. In response, Shearer again stated that he was pleased with Bennington's work and that he had nothing "to be concerned about," adding that Shearer made any termination decisions for workers in his group.

Approximately three working days later, Bennington was told to report to Wroblewski's office. Dutifully, Bennington reported to Wroblewski's office and was bluntly told to "go clean out your desk, do it quickly, and be quiet about it." No explanation was given, other than to report back to Shearer about where to go next and that Bennington was "a high maintenance manager." When Bennington asked Shearer what was going on, Shearer was speechless. The only thing Shearer was able to say was for Bennington to report to Building B, a completely vacant and empty shop. This area, however, was the depot for the Special Projects Group, otherwise known as waste management.

At the very least, Bennington demonstrated that a genuine issue of material fact exists with regard to whether he was treated less favorably than other younger, similarly situated employees, and thus Caterpillar's motion for summary judgment on this claim must be denied. *See* Pitasi, 184 F.3d at 714.

Under the burden-shifting analysis, once the plaintiff demonstrates that the adverse employment action was, at least in part, motivated by unlawful discrimination, the defendant may still avoid liability by showing that it would have made the same decision in the absence of the unlawful motivation.

Miller v. Champaign Community Unit Sch. Dist., No. 4, 983 F. Supp. 1201, 1208 (C.D. Ill. 1997). In the instant case, Caterpillar suggests that Paul Wroblewski, Caterpillar's primary decision maker for purposes of this case, honestly believed that Bennington was not supportive of its teamwork initiative, specifically pointing to Bennington's allegedly "poor attitude and job performance." However, Bennington has presented sufficient evidence to indicate that Caterpillar's proffered non-discriminatory reason for transferring him is merely a pretext for unlawful discrimination.

In this context, "[p]retext means a lie, specifically a phony reason for some action." James v. Sheahan, 137 F.3d 1003, 1007 (7th Cir. 1998) (citation omitted; internal quotations omitted). A plaintiff may establish pretext by demonstrating any one of the following: (1) the explanation had no basis in fact; (2) the explanation was not the real reason; or (3) the reason stated was insufficient to warrant the adverse job action. *Id.* at 1007; Zamudio v. Patla, 956 F. Supp. 803, 813 (N.D. Ill. 1997). Moreover, the plaintiff need only prove pretext by a preponderance of the evidence. *See id.* at 813; Perdomo v. Browner, 67 F.3d 140, 145 (7th Cir. 1995) (regarding summary judgment on pretext issue, question is whether plaintiff produced enough evidence from which a rational fact finder could infer that defendant lied in proffering non-discriminatory reason for adverse employment action). The same facts which support Bennington's argument regarding other evidence of discrimination also support the present argument regarding pretext. *See* Part I.B.1., *supra*. It is Caterpillar's contention that Bennington was transferred essentially because he avoids taking responsibility, blames others for his failures, and did not produce sufficient results. The above-referenced facts, however, clearly demonstrate that Caterpillar's purported reasons for transferring Bennington are merely lies. In sum, not only did Bennington successfully manage his own workers, but he successfully coordinated with other departments when his responsibilities were increased, and still met the deadlines imposed. Bennington did excellent work and played key role in difficult job of making problem area current. In fact, Holloman stated in his declaration that, Bennington was "best [manager] I had ever seen". *See also* Brown v. City of Aurora, 942 F. Supp. 375, 381 (N.D. Ill. 1996) ("The Court does not believe that there can be a bright-line rule as to whether discriminatory remarks, by themselves, are sufficient to raise a reasonable inference that the employer's legitimate, nondiscriminatory reason is pretextual. Rather, each case must be analyzed on its own facts. The inquiry should focus on the type and frequency of the remark, the context in which the remark was stated, the period of time between the remark and the adverse employment action, whether the remark was uttered by the decision maker, and any other relevant factors.") (in that case, the plaintiff survived summary judgment on the pretext issue). At the very least, Bennington demonstrated that a genuine issue of material fact exists regarding Caterpillar's allegedly non-discriminatory reason for transferring him, and thus Caterpillar's motion for summary judgment on this claim should have been denied. *See* Pitasi, 184 F.3d at 714.

In regard to Bennington's constructive discharge claim, contrary to Caterpillar's assertions, it did not make any efforts to make the "Special Projects" work environment more tolerable. Rather, Caterpillar's actions unequivocally suggest that it intended to make the "Special Project" employees' circumstances as intolerable as possible. As previously indicated, the Special Projects Group was a farce; it was merely the official name for what was commonly referred to as waste management. That term was commonly used to describe when Caterpillar employees "moved into a vacated building or empty work area, placed in there and given no assignments." Thus, rather than being assigned special projects, as the official title implies, or even being assigned *any* company projects, members of that group were told to look for other work. However, the unwarranted negative alterations to Bennington's review made it virtually impossible to get other work within Caterpillar. Clearly, the title Special Projects Group is merely a polite term for what is in reality a dumping ground for unwanted employees. Whatever title one puts on this group of Caterpillar employees, the fact remains that Bennington was a part of that group. Consequently, the logical inference from Caterpillar's actions is that it intended these employees to get out of the company. Accordingly, the above described facts provide strong circumstantial evidence that Bennington *was* discriminated against.

Additionally, Caterpillar suggests Bennington was "unreasonably sensitive to his working environment" in that several weeks after being transferred to the "Special Projects Group," Bennington allegedly voluntarily retired. Bennington only very reluctantly decided to retire, given his bleak outlook at Caterpillar. At that point, Bennington had basically been left to spend his "working" days at Caterpillar in a vacant room with nothing to do, having been told to look for another job. However, the negative review assured Bennington that he would be unable to find another position at Caterpillar and furthermore deprived Bennington of the protections of Caterpillar's Salaried Employment Security Program. As such, Bennington was left in "waste management" where he had no prospects of another position with Caterpillar and where he was in fear of being fired and losing all retirement benefits. No reasonable person could withstand these circumstances and would eventually leave the company. Given these dire circumstances, and after considering his financial responsibility to his family, Bennington opted for retirement, rather than run the risk of being fired. Cf. Christensen v. Equitable Life Assur. Society of United States, 767 F.2d 340, 343 (7th Cir. 1985) (where employer gave plaintiff choice between transfer and termination it constituted constructive discharge), *cert. denied*, 474 U.S. 1102 (1986). In light of these facts, Bennington's decision to "retire," rather than remain in waste management at Caterpillar, was certainly reasonable. *See* Zorn v. Helene Curtis, Inc., 903 F. Supp. 1226, 1249 (N.D. Ill. 1995) (constructive discharge claim is not automatically defeated by fact that plaintiff endured environment for some time; plaintiff may either quit "cold turkey" or endure lengthy period of turmoil) (citing Rodgers v. Western-Southern Life Ins. Co., 12 F.3d 668, 677 (7th Cir. 1993)).

Bennington at least has demonstrated that a genuine issue of material fact exists on his constructive discharge claim, and thus Caterpillar's motion for summary judgment on this claim should have been denied. *See Pitasi*, 184 F.3d at 714.

A hostile environment claim is based upon conduct which "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment." Venters v. City of Delphi, 123 F.3d 956, 975 (7th Cir. 1997) (quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986)). The hostile environment analysis is based on the totality of the circumstances. Venters, 123 F.3d at 975 (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993)); *Zorn*, 903 F. Supp. at 1240 & n.13 (no single factor is required in determining whether environment is hostile; isolated instances must be evaluated cumulatively to realistically view work environment) (citing Doe v. R.R. Donnelley & Sons Co., 42 F.3d 439, 443 n.3 (7th Cir. 1994)). Whether a hostile environment existed must be judged from both an objective and subjective point of view. Venters, 123 F.3d at 975-76. Under the subjective view, the court must look at the facts as the plaintiff, whereas the objective view calls for the court to examine the facts as a reasonable person. *Id.* at 976. By his filing of the instant lawsuit, it is evident that Bennington views

Caterpillar's conduct as creating a hostile environment. Therefore, the critical aspect of this analysis must focus on whether a reasonable employee would view Caterpillar's conduct as such.

Under the objective view, the court should consider factors such as "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Wilson v. Chrysler Corp., 172 F.3d 500, 510 (7th Cir. 1999) (quoting Harris, 510 U.S. at 23). Moreover, "[t]he criterion is not what a reasonable employee is capable of enduring but whether the offensive acts alter the conditions of employment." Wilson, 172 F.3d at 510. Based on the facts of this case, Bennington has established facts sufficient to enable his hostile environment claim to survive summary judgment. In fact, Bennington has satisfied all of the above suggested objective criteria in the hostile environment analysis.

One of the factors to consider is the frequency of the discriminatory conduct. In this case, not only was Caterpillar's discriminatory conduct frequent, but it was virtually constant. The basis for Bennington's claims involve his transfer to waste management and the totally unreasonable conditions therein. Once Caterpillar transferred Bennington to waste management, he remained there until he left the company. Therefore, the hostile environment Bennington was made to suffer was on a continual basis; five days a week, eight hours per day. Another factor to consider is the severity of the hostile environment and the humiliation involved. In this case, Bennington was directed to sit in an empty warehouse all day with nothing to do. Moreover, being associated with waste management was extremely embarrassing and humiliating. Bennington was put down in the shop where people could walk by and view you from the windows outside. Bennington was humiliated and lived with the constant fear that at any moment, someone would walk in and tell him to clean out his drawers and get out of there, that he was no longer employed with Caterpillar.

The final suggested factor to consider is whether the employer unreasonably interfered with the employee's job performance. Here, Caterpillar completely and unreasonably interfered with Bennington's job performance by placing Bennington in waste management. As stated above, Bennington was given no work and no responsibilities. Consequently, Caterpillar either interfered with Bennington's job performance, or, alternatively, failed to give him any responsibilities to interfere with at all.

Moreover, the above-described discrimination was age-based. Dan Murphy, a Caterpillar vice-president, stated on at least one occasion, that he was creating a "Waste Management" Department. As previously indicated, that term was commonly known by Caterpillar employees to mean a dumping ground for unwanted employees. As all of the employees placed in waste management with Bennington were over 50 years of age, and employees younger than the displaced employees filled in their old positions, an inference arises that age was a motivating factor for Murphy's decision to place Bennington in waste management.

Bennington has demonstrated a genuine issue of material fact exists on his hostile environment claim, constructive discharge claim and by his transfer to waste management under the ADEA and thus Caterpillar's motion for summary judgment should have been denied. *See* Pitasi, 184 F.3d at 714.

II. Intentional Infliction of Emotional Distress

Under Illinois law, the essential elements for an IIED claim are threefold: (1) extreme and outrageous conduct, (2) done either with the intent or knowledge of a high probability that it will, (3) cause severe emotional distress. Holder v. Ivanjack, 39 F. Supp. 2d 964, 969 (N.D. Ill. 1999) (citing Schroeder v. Lufthansa German Airlines, 875 F.2d 613, 623 (7th Cir. 1989)). Caterpillar did not dispute the second element of Bennington's IIED claim, so only the first and third elements are in dispute. Rickgauer v. Martin Marietta Materials, Inc., 55 F. Supp. 2d 899, 903 (C.D. Ill. 1999) (in deciding summary judgment, court must view evidence in light most favorable to nonmovant).

As a general matter, courts have had trouble attaching a precise definition to the term "extreme and outrageous," although some guidelines have been laid out. Patterson v. Xerox Corp., 901 F. Supp. 274, 278 (N.D. Ill. 1995). In essence, to be extreme and outrageous for IIED purposes, the conduct must go "beyond all possible bounds of decency." Holder, 39 F. Supp. 2d at 970. Moreover, such a determination must be made on a case-by-case basis, depending on the particular facts presented. Schroeder, 875 F.2d at 623. Especially relevant to the present inquiry is the fact that "[e]xtreme and outrageous conduct may be the result of an abuse of a position of power". Holder, 39 F. Supp. 2d at 970.

> [T]he more control which a defendant has over the plaintiff, the more likely that defendant's conduct will be deemed outrageous, particularly when the alleged conduct involves either a veiled or explicit threat to exercise such authority or power to plaintiff's detriment. Threats, for example, are much more likely to

> be a part of outrageous conduct when made by someone with the ability to carry them out [than] when made by someone in a comparatively weak position.

Patterson, 901 F. Supp. at 279 (quoting McGrath v. Fahey, 126 Ill. 2d 78, 533 N.E.2d 806, 809 (1988)). In the instant case, Bennington has alleged that his employer and supervisors were the actors for purposes of his IIED claim. *See generally* Am. Compl. As such, they were in a position of authority over him and used that power and authority to cause the extreme and outrageous conduct in this case. Therefore, Bennington has clearly identified extreme and outrageous conduct to make out a prima facie IIED claim.

Caterpillar further attacks Bennington's IIED prima facie case as lacking evidence of severe emotional distress. In its Memorandum, Caterpillar argues that Bennington's IIED claim must fail because there is no evidence indicating that Bennington suffered such severe emotional distress as to warrant hospitalization, psychiatric treatment, or prescription medication. However, an IIED plaintiff's injuries do "not need to result in physical injury or the threat of physical injury". Holder, 39 F. Supp. 2d at 969 (citing Schroeder, 875 F.2d at 623). In consideration of the fact that Caterpillar was attempting to terrorize these employees who were placed in waste management and forced their retirement, it is quite obvious that Caterpillar was intentionally inflicting emotional distress upon James Bennington and the other employees placed in waste management.

It must be remembered that supervisory personnel were placed in a vacant room with nothing to do, and placed on display in this empty building in a vacant room which Bennington likened to a POW camp. This building was a shop where people could walk by and view you from the windows outside. It was common knowledge throughout Caterpillar that these were unwanted employees. Further, as a result of the unwarranted change to his performance review, Bennington was removed from the Salary Protection Program offered by Caterpillar and had been stripped of all job security. Bennington was put on public display, humiliated and lived with the constant fear that at any moment, someone would walk in and tell him to clean out his drawers and get out of there, that he was no longer employed with Caterpillar. Being 53 years old, and after having worked hard for Caterpillar for thirty-three years, Bennington was placed in the impossible situation of having to choose to retire early or to risk losing the retirement benefits which he had worked to secure for nineteen years. The unbelievable stress caused by this situation was such that no reasonable person could withstand it and would eventually leave the company. Bennington was placed in waste management on or about February 9, 1998. He was only able to remain in said position and withstand the stress created by it until May 6, 1998. When he could no longer tolerate the stress and the intolerable position in which he was placed, Bennington opted for early retirement. This was exactly the response that Caterpillar was hoping for in order to eliminate fifty management positions.

Despite all of these facts (which the district court must take as true when considering a motion for summary judgment), the district court held that Bennington failed to point to any facts that would indicate he has suffered any emotional distress at all. Bennington clearly stated a prima facie case for his claim of intentional infliction of emotional distress.

III. Refusal to Reopen Discovery

The district court denied petitioner's motion to reopen discovery in the instant case. It is quite possible that Magistrate Gorman, after only a few weeks on the Federal Bench, was not aware that Attorney William Anderson had recently taken over the within case and was not the original attorney for Petitioner.

Further, in the court of appeals decision affirming the ruling of the district court, it states that "Bennington contends that the district court erred in not reopening discovery after the deadline had expired". This statement shows that the court of appeals did not fully understand the situation. The discovery deadline was August 14, 2000; petitioner's motion to reopen discovery was *not* filed after the deadline had expired, but rather was filed prior to the expiration of the applicable deadline, on August 10, 2000.

It is clear from the record in this case that Attorney William M. Anderson IV took over this pending litigation after the withdrawal from the practice of law by Attorney Dean Poignant. As such, William Anderson was left in the position of undertaking representation in the within case without the normal lead time which would be established in preparing said litigation.

In addition, the basic purpose of the Federal Rules is to administer justice through fair trials and not through summary dismissals as necessary as they may be on occasion. These rules were designed in large part to get away from some of the old procedural booby traps which common law pleaders could set up to prevent litigants from ever having their day in court. If rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits. Surowitz v. Hilton Hotels Corp., 383 U.S. 363 (1966)

In the within case, it is clear that the Respondent has used the rules of procedure to prevent Petitioner from conducting reasonable discovery in the within case. An examination of the correspondence between counsel and Petitioner's Motion to Re-Open Discovery will show that Petitioner was making every attempt to proceed forward with discovery depositions and that these efforts were constantly frustrated by attorneys for Respondent.

Indeed, Respondent played games, like only making a deponent available upon the last day of discovery and then objecting to any continuation of discovery deadlines. Then in later correspondence, when time was too short to be practical, stating that an earlier date might be available but refusing to commit to specific dates and times of availability.

When it became clear that oral requests for discovery scheduling would be denied by attorneys for the Respondent and that the Respondent's attorneys would even attempt to claim that said efforts had never even been made. Attorney for Petitioner began requesting scheduling of depositions in writing by correspondence on June 30, 2000 and on July 17, 2000, which correspondence was not responded to until July 19, 2000 and, even then, no schedule of available dates was even given as requested in the correspondence approximately three weeks earlier of June 30, 2000. When Petitioner again corresponded on July 17, 2000 only a partial response was received until July 24, 2000 when Respondent's counsel knew from Petitioner's prior correspondence that he would be out of the State of Illinois for approximately one week. Said correspondence stated that they could only proceed with depositions on the very last day that the Court had approved for conclusion of discovery. Upon learning of Respondent's request for August 14, 2000 deposition date, counsel for Petitioner again sent correspondence to counsel for Respondent dated August 4, 2000 requesting dates prior to August 14, 2000 to conduct additional discovery or, in the alternative, informing

Attorney for Respondent that it would be necessary to file a motion to extend the discovery deadline. It should be noted that this correspondence of August 4, 2000 was sent by facsimile to bring a quick resolution. On August 7, 2000 Attorneys for Respondent responded stating that there is a "chance" they could be available on one or two days prior to the 14th of August, the deadline the Court had imposed and, notifying Petitioner that they would object to any continuation of discovery, after they had effectively delayed discovery to the point where it could not conclude by the deadline established by the Court.

As such, Petitioner filed its motion on August 10, 2000 to extend the amended discovery deadline. This motion to extend the discovery deadline was denied by Magistrate Judge Gorman.

The court of appeals in affirming the decision of the district court misquoted petitioner's attorney when he conceded that he probably was not as diligent as he should have been in pursuing discovery. This statement is quoted by the court of appeals out of context. Petitioner's attorney had made this statement referring to the time when he had initially taken over the case and after explaining to the court of appeals the obstacles which respondent's attorney had placed to completing discovery. It is a rare person who, when looking back in hindsight, cannot think of anything he could have done differently.

Federal Rule 30.1 of the local rules of the United States District Court for the Central District of Illinois, to wit:

> "Rule 30.1 - Scheduling of Depositions - In scheduling any deposition, counsel must make a good faith effort to coordinate with all opposing counsel the scheduling of a time that is mutually convenient to all opposing counsel and parties. The signing and serving of a Notice

> of Deposition shall constitute a certification by the attorney signing and serving the Notice of Deposition that the attorney has complied with this rule."

Pursuant to the above quoted Rule 30.1 regarding scheduling of depositions, the signing and serving of a Notice of Deposition shall constitute a certification by the attorney signing and serving the notice that the attorney has complied with this rule. In other words, counsel for petitioner was required to make a good faith effort to coordinate with all opposing counsel the scheduling of time and date for said depositions that are mutually convenient to all counsel and parties.

Attorney William M. Anderson attempted to comply with this rule by repeatedly asking for available dates with opposing counsel and if Attorney William M. Anderson had merely noticed up all dates for all requested discovery depositions on dates that were convenient only to William M. Anderson, then this Court surely would have allowed said discovery to proceed forward even if said dates had been inconvenient to the defense counsel, however, this would have violated the spirit and letter of Rule 30.1.

Caterpillar also created another reason to re-open discovery when it filed the Declaration of Paul E. Wroblewski (the manager who transferred James Bennington to waste management) on or about August 28, 2000. Caterpillar apparently had the Declaration of Paul E. Wroblewski since July 21, 2000, the date it was executed, but did not file it with this Court until after the deadline for discovery had passed. There are several major discrepancies between the Declaration of Paul E. Wroblewski and the testimony of others deposed in the case, to date. These differences include, but are not limited to, the fact that Paul Wroblewski claims that Bennington had over 200 employees when, in fact, Bennington had approximately 107 employees. Further, Wroblewski claimed that Bennington promised to have orders current by the end of May, 1997 in paragraph 14 of his Declaration, however, Bennington did not even assume responsibility for this commercial area until June or July of 1997

However, one of the most telling items in Wroblewski's declaration and one of the most important reasons for re-opening discovery is that fact that in paragraph 23 of Wroblewski's declaration, it is admitted that there was a decision between Dan Murphy and the people who report directly to him, including Wroblewski, to eliminate from management some managers and supervisors. Caterpillar gives different reasons for the elimination of these managers and supervisors, as might be expected, however, it remains that Caterpillar has, in effect, admitted that they were undertaking a program to eliminate management employees. As such, it is only reasonable that given this information, Petitioner be allowed to pursue said information to determine and prove that, in fact, all of the management employees who Caterpillar removed through this program were replaced by employees younger than those employees eliminated.

Caterpillar appears to be working very hard, even to the point of an unwarranted attack on the veracity of Petitioner's counsel in order to prevent Bennington from obtaining information which would show the number of elderly employees forced into retirement and allow petitioner to prove his contention that these employees were all replaced by younger employees.

Petitioner should not be prejudiced for repeatedly attempting to schedule said depositions with respondent's counsel and for following local Rule 30.1. In addition, respondent should not be able to sit back and refuse to cooperate with discovery and then reap the benefits of such conduct.

As such, it is clear that in order to do justice in the within case, petitioner must be allowed to conduct reasonable discovery and has not, as yet, had that opportunity because of the interference of counsel for respondent.

CONCLUSION

For the above reasons, petitioner respectfully prays that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

By:
William M. Anderson IV
Anderson Law Offices
625 South Main
Creve Coeur, Illinois 61610
(309) 694-6250

APPENDIX

TABLE OF CONTENTS OF APPENDIX

Decision from the US Court of Appeals .... A-1 - A-10

Judgment in a Civil Case A-11

Order (1-12-01) .... A-12 - A-24

Relevant Statutes .... A-25 - A-39

Motion to Reconsider .... A-40 - A-59

Order (1-31-01) .... A-60 - A-62

Plaintiff's Memorandum in Opposition
to Defendant's Motion for Summary Judgment ..... A-63 - A-95

Motion to Re-Open Discovery .... A-96 - A-101

Declaration of Jerry B. Holloman .... A-102 - A-110

Performance Evaluation of
James Bennington .... A-111 - A-123

In the
United States Court of Appeals
for the Seventh Circuit

No. 01-1361

JAMES BENNINGTON,

Plaintiff-Appellant,

v.

CATERPILLAR INCORPORATED,

Defendant-Appellee.

Appeal from the United States District Court
for the Central District of Illinois.
No. 99 C 1111 - Joe B. McDade, *Chief Judge*

ARGUED NOVEMBER 30, 2001
DECIDED DECEMBER 28, 2001

Before FLAUM, *Chief Judge,* and CUDAHY and MANION, *Circuit Judges.*

FLAUM, *Chief Judge*. The appellant, James Bennington, has filed the instant appeal contesting the district court's grant of summary judgment against him and the district court's refusal to grant an extension of discovery. For the reasons stated herein, we affirm the decisions of the district court.

I. BACKGROUND

James Bennington was born in 1944 and began his employment with Caterpillar, Inc. ("Caterpillar") in 1965. He continued to work with that company until 1998. In 1987, after several years of exemplary performance, Caterpillar made Bennington a manufacturing superintendent in its Mossville, Illinois facility. In the mid-1990's, Caterpillar changed Bennington's title to unit manager. During the course of the 1990s, Bennington was transferred to different areas within the Mossville plant. In 1997, Bennington was transferred to Building DD on the Mossville plant and was charged with the supervision of the first shift of two assembly lines. When Bennington was first transferred to this position, his immediate supervisor was Jerry Holloman. Holloman was responsible to Paul Wroblewski, then the Operations Manager at the Mossville facility.

The events giving rise to the current dispute began when Caterpillar implemented an initiative to bring a "team-based management structure" to the plant where Bennington worked. That initiative was entitled "Vision, Values, and Time." While Caterpillar was implementing its initiative, it was also in the process of closing down one of the buildings on the Mossville facility and transferring employees from that facility to the building where Bennington worked. Bennington supervised this relocation process and retained his other responsibilities.

In December, 1997, Jerry Holloman retired from Caterpillar. Prior to his retirement, however, he completed a performance evaluation for Bennington. On the whole, Holloman's evaluation of Bennington was quite favorable. However, the evaluation also stated that Bennington should have used certain tools, "8D teams of FMEA activities," in his capacity as a supervisor. Caterpillar claims that these comments were critical of Bennington and Bennington contends that they merely set forth goals for the coming year. While Holloman characterized his evaluation of Bennington as an "extremely good review," Caterpillar management reviewed the report and found that it did not adequately reflect its concerns with Bennington's performance. Therefore, Holloman's supervisor, Paul Wroblewski, made several changes to Bennington's review.

As a result of these changes, Bennington was eventually given a very negative performance evaluation for 1997. Specifically, the evaluation noted that Bennington avoided taking responsibility for his results, that inventory, accuracy, quality and safety in Bennington's area of supervision did not meet appropriate standards and that Bennington's efforts at implementing team-based initiatives were minimal. Caterpillar supervisors also created a supplemental evaluation criticizing Bennington for his failure to apply leadership skills to problems arising in the area he supervised.

In February, 1998, Caterpillar decided to eliminate Bennington's position. Caterpillar contends that this decision was consistent with its teamwork initiative. Although the company did eliminate Bennington's position, it did not terminate Bennington. Instead, Bennington was transferred, along with other managers whose positions had been eliminated, to a unit entitled "Special Projects Group."

According to Bennington, the Special Projects Group was routinely referred to by his supervisors as "waste management" and his duties there were minimal. Bennington remained at the same rate of pay after this transfer, however, he was assigned to an empty work area and was told to look for work.

Shortly after this transfer, Bennington told his supervisors that he was contemplating retirement. According to Bennington, he felt undermined by his 1997 review and the elimination of his position. Bennington announced his retirement in April 1998 and officially retired that July.

After his retirement, Bennington filed suit against Caterpillar. Bennington's complaint alleged that Caterpillar had violated the Age Discrimination in Employment Act ("ADEA") by transferring him, by constructively discharging him and by creating a hostile work environment. Bennington also alleged that Caterpillar intentionally inflicted emotional distress upon him.

After the discovery deadline had passed, Bennington filed a motion for an extension. This motion was denied. Caterpillar then filed a motion for summary judgment, which was briefed by the parties. After briefing of the motion, the district court granted summary judgment against Bennington on all counts. Bennington filed the instant appeal.

II. DISCUSSION

We review a district court's grant of summary judgment *de novo*, viewing all facts and drawing all reasonable inferences in the non-moving party's favor. *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1084 (7th Cir. 2000). We exercise an abuse of discretion standard over a district court's refusal to reopen discovery.

A. Grant of Summary Judgment

The district court granted summary judgment on all four counts of Bennington's suit. As will be described more fully below, we agree with the district court's disposition of Bennington's claims, as Bennington has failed to create a factual record that would permit his case to go to trial.

1. Prima Facie Case of Age Discrimination

In ruling on Caterpillar's summary judgment motion, the district court concluded that Bennington failed to establish a *prima facie* case of age discrimination by Caterpillar. Bennington has conceded that he presented no direct evidence that Caterpillar discriminated against him because of his age.[1] Accordingly, his claim must be analyzed pursuant to the indirect burden-shifting approach set forth under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under the *McDonnell-Douglas* test, in order to establish a *prima facie* case of age discrimination, a plaintiff must prove that he was: (1) in a protected class; (2) performing his job satisfactorily; (3) the subject of an employment action that was materially adverse; and (4) that other substantially younger and similarly situated employees were treated more favorably than the plaintiff. *See Gonzales v. Ingersol Milling Machine Co.,* 133 F.3d 1025, 1031 (7th Cir. 1998). The district court determined that Bennington failed to state a *prima facie* case because he could not satisfy the fourth element of the above test: that other substantially younger and similarly situated employees were treated more favorably than the plaintiff. Having reviewed the record below, we agree with the district court's decision.

---

[1] According to the precedent of his court, direct evidence is "evidence that can be interpreted as an acknowledgment of discriminatory intent by the defendant or its agents." *Hill v. Burrell Communication Group,* 57 F.3d 665, 667 (7th Cir. 1995) (internal citations omitted).

At the outset, we state that the record is bereft of facts supporting Bennington's claims of age discrimination. We must base our review only upon those facts that were a part of the record before the court below. *Plakas v. Drinski,* 19 F.3d 1143, 1147 (7th Cir. 1994). When we examine that record, we find that Bennington has offered proof that only one other similarly situated and younger employee was given preferential treatment. That employee, Perry Lubber, took over Bennington's responsibilities when he was transferred to the Special Projects Unit and was only five years younger than Bennington.[2] Generally, when both the plaintiff and those allegedly favored over him are within the same protected class, "the *prima facie* case under the ADEA require[s] a sufficient disparity in ages." *Hartley v. Wisconsin Bell, Inc.*, 124 F.3d 887, 892 (7th Cir. 1997). This court "consider[s] a ten year difference in ages (between the plaintiff and [his] replacement) to be presumptively 'substantial'" *Id.* at 893. In *Hartley*, this court concluded that a seven-year difference between the plaintiff and the employees allegedly favored over her was not significant enough to present a *prima facie* case under the ADEA. Just as in *Hartley*, the five-year difference in age between both Bennington and Lubbers is not substantial enough (in and of itself) to set forth a *prima facie* age discrimination case.

In cases where the age difference between the plaintiff and the individual treated more favorably is less than ten years, "the plaintiff still may present a triable claim if [he] directs the court to evidence that [his] employer considered [his] age to be significant." *Id.* Bennington has not presented any evidence that Caterpillar's decisions affecting his employment were motivated by his age. Even assuming, as we must, that the Special Projects Unit to which Bennington and other managers were assigned had been derisively referred to as "waste management" by Caterpillar higher-ups, or that Bennington's review was changed improperly, such comments or actions do not (without more facts) evidence hostility on the basis of age. The insubstantial difference in age between Bennington and Lubbers and the absence of discriminatory animus by Caterpillar supports the district court's grant of summary judgment on this claim.

---

[2] Lubber, as an individual over forty years of age, was also in a protected class pursuant to the ADEA.

2. Constructive Discharge

The district court's ruling on Bennington's constructive discharge can be affirmed largely for the same reasons as set forth above: the record contains no evidence of Caterpillar's discriminatory animus towards Bennington. To establish that he was constructively discharged, Bennington must show that "his working conditions were so intolerable that a reasonable person would have been compelled to resign." *Simpson v. Borg-Warner Automotive, Inc.*, 196 F.3d 873, 877 (7th Cir. 1998). Bennington must also demonstrate that the working conditions were intolerable because of impermissible *age discrimination. Id.; see also Drake v. Minnesota Mining & Mfg. Co.*, 134 F.3d 878, 886 (7th Cir. 1998). Bennington has also failed to link the conditions of his employment to any age-related bias on the part of Caterpillar. Accordingly, we affirm the decision of the district court.

3. Hostile Work Environment

Bennington asserts that he was subjected to a hostile work environment because of his age. This Circuit has assumed, without deciding, that plaintiffs may bring hostile environment claims under the ADEA. *See Halloway v. Milwaukee County*, 180 F.3d 820, 827 (7th Cir. 1999). We will do likewise here because we conclude that, even if such a hostile work environment claim could be brought under the ADEA, Bennington could not prevail.

In order to succeed on a hostile work environment claim, "the environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim did in fact perceive to be so." *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998). To determine the hostility of an environment, a court must examine the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating; or a mere offensive utterance . . ." *Id.* at 787-88. As stated above, Bennington has failed to produce evidence that the alleged offensive conduct was discriminatory. Based upon the record before us, Caterpillar officials may have been rude or unfair to Bennington. However, absent more facts this conduct does not rise to the level of legally redressible discrimination.

4. Intentional Infliction of Emotional Distress

We also affirm the district court's disposition of Bennington's Illinois common law claim for intentional infliction of emotional distress. Under Illinois law, the elements of a claim for intentional infliction of emotional distress are as follows: (1) the conduct involved must be truly extreme and outrageous; (2) the defendant must either intend the infliction of emotional distress or know that there is a high probability that his conduct will result in such distress and; (3) the conduct must in fact cause severe emotional distress. *McGrath v. Fahey,* 553 N.E.2d 806, 809 (Ill. 1988). In addition, Bennington's distress must be "so severe that no reasonable man could be expected to endure it." *Id.*

Apart from the bald assertions contained in Bennington's complaint, there is scant evidence that Caterpillar intended to inflict distress upon him. Furthermore, Bennington has proffered no evidence (either in the form of medical documentation or deposition testimony) that he has in fact suffered from *any* form of emotional distress. Because Bennington "cannot leave it to this court to scour the record in search of factual or legal support for" his allegations, we affirm the decision of the district court with respect to this claim as well. *Colburn v. Trustees of Indiana Univ.,* 973 F.2d 581, 593 (7th Cir. 1992).

B. Refusal to Reopen Discovery

Lastly, Bennington contends that the district court erred in not reopening discovery in this case after the deadline had expired. Prior to the district court's decision on this matter, this case had a rather lengthy history. Bennington's first counsel was replaced by a substitute counsel and the discovery deadline was extended. After this seventh month extension was granted and the next discovery deadline expired, Bennington's second counsel moved to reopen discovery. At oral arguments, counsel for Bennington conceded that after the discovery extension was granted he "probably was not as diligent as [he] should have been in pursuing discovery . . ." In light of the procedural meanderings of this case (two separate counsel and at least one discovery extension), this court cannot conclude that the district court acted outside the bounds of its discretion in denying Bennington's motion.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the decisions of the district court.

A true Copy:

Teste:

____

Clerk of the United States Court of

Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

JUDGMENT IN A CIVIL CASE

JAMES BENNINGTON

vs. Case No. 99-1111

CATERPILLAR, INC.

☒ DECISION BY THE COURT. This action came before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that summary judgment is entered in favor of Defendant and against Plaintiff. Each party to bear costs of the suit.

ENTER this 12th day of January, 2001.

/s/ John M. Waters
JOHN M. WATERS, CLERK

/s/ H. William
BY: DEPUTY CLERK

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

JAMES BENNINGTON,)
)
Plaintiff,)
)
vs.) Case No. 99-1111
)
CATERPILLAR, INC.,)
)
Defendant.)

ORDER

Before the Court are Defendant's Motion for Summary Judgment (Doc. #35) and Plaintiff's Motion to Re-Open Discovery (Doc. #40). Plaintiff brought suit against Defendant alleging violations of the Age Discrimination in Employment Act (ADEA) and intentional infliction of emotional distress. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331 and § 1367. For the reasons set forth below, Defendant's Motion for Summary Judgment will be granted and Plaintiff's Motion to Re-Open Discovery will be denied.

BACKGROUND

Plaintiff James Bennington ("Bennington") began his employment with Defendant Caterpillar, Inc. ("Caterpillar") in 1965 as a machine shop apprentice. (Defendant's Statement of Undisputed Facts, Doc. #38 ¶1 (hereinafter Def.'s Stat. ¶¶2-4 and ¶¶15-21.)

In 1987, Caterpillar transferred Bennington to its Mossville, Illinois plant. (Def.'s Stat. ¶15.) His title at that time was Manufacturing Superintendent. (Def.'s Stat. ¶15.) In

1989, Bennington was transferred from first to second shift to supervise the assembly area. (Def.'s Stat. ¶15.) About 7 months later, Bennington was transferred back to the day shift and began supervising component manufacturing at the same facility (Def.'s Stat. ¶17.) In the mid 1990's, Bennington's title changed to Unit Manager. (Def.'s Stat. ¶18.) In 1996, Caterpillar decided it only needed one Unit Manager in the area to which Bennington was assigned, so, they eliminated Bennington's position and transferred him to another area as a troubleshooter to help reduce engine assembly defects. (Def.'s Stat. ¶19.) In January of 1997, Bennington was laterally transferred to another area, building DD, to manage assembly lines during the day shift. (Def.'s Stat. ¶20.) There were four assembly lines in building DD at that time. Bennington supervised two of them and another manager supervised the other two as well as the paint department and engine test area. (Def.'s Stat. ¶21.)

When Bennington was first transferred to building DD, his direct supervisor was Jerry Holloman, the factory manager of that building. (Def.'s Stat. ¶25.) Also at that time, Caterpillar was in the process of closing down another building and transferring some of the operations from the closed building to building Dd. (Def.'s Stat. ¶27.) Some time after this transition, Bennington began supervising the relocated operations, referred to as "commercial assembly work." (Def.'s Stat. ¶28.) Bennington also retained responsibility over shipping. (Def.'s Stat. ¶28; Plaintiff's Response to Defendant's Undisputed Facts, Doc. #44 ¶28 [hereinafter Pl.'s Resp.]) The date that Bennington was transferred is in dispute. Bennington asserts he was transferred on or after June 1, 1997. (Pl.'s Resp. ¶28.) Caterpillar asserts Bennington was transferred prior to May of 1997. (Def.'s Stat. ¶33.)

Bennington states that he was transferred to the commercial assembly work area because the area was in "trouble" and he was supposed to bring it up to speed. (Pl.'s

Resp. ¶32.) On the other hand, Caterpillar states the are began failing to meet shipment dates shortly after Bennington began supervising it. (Def.'s Stat. ¶32.) This factual dispute is related to the dispute over when Bennington assumed responsibility for the commercial assembly area, since the trouble began in that area prior to May of 1997. (Def.'s Stat. ¶33; Pl.'s Resp. ¶33.)

In November or December of 1997, Jerry Holloman, Bennington's direct supervisor, retired. (Def.'s Stat. ¶34; Pl.'s Resp. ¶34.) Prior to his retirement, Holloman prepared Bennington's 1997 performance evaluation. (Def.'s Stat. ¶35.) In the evaluation, Holloman stated that Bennington should include "8D teams or FMEA activities" in his next years plan. (Pl.'s Resp. ¶36.) Caterpillar states that these comments were criticism; Bennington argues that they were goals. (Def.'s Stat. ¶36, Pl.'s Resp. ¶36.) Bennington states the evaluation initially prepared by Holloman was an "extremely good review." (Pl.'s Resp. ¶36.) Caterpillar states the evaluation was more critical. (Def.'s Stat. ¶36-37.) Nevertheless, it is the general practice of Mossville managers to review performance evaluations prepared by subordinates. (Def.'s Stat. ¶38.) In accordance with this practice, Paul Wroblewski reviewed Holloman's evaluation of Bennington and made several handwritten changes to the evaluation. (Def.'s Stat. ¶39.) Caterpillar states these changes were made because Wroblewski believed Holloman's evaluation did not accurately reflect Bennington's performance and Caterpillar further states that this belief was based on Wroblewski's knowledge of Bennington's job performance. (Def.'s Stat. ¶39.) Bennington asserts the changes were not made because of any performance deficits on his part. (Pl.'s Stat. ¶39.)

In the end, Bennington was given a very negative 1997 performance evaluation. (Def.'s Stat. ¶40.) Specifically, the evaluation stated that Bennington avoided taking responsibility for his results; that inventory, accuracy, quality, safety, and expenses in Bennington's area did not meet requirements; that Bennington blamed others for his failures; and that Bennington's team initiative was minimal. (Def.'s Stat. ¶40.) Wroblewski also prepared a supplement to this evaluation in which he criticized Bennington for not applying leadership skills and for making or blaming others for problems in the commercial area. (Def.'s Stat. ¶41.)

Prior to February, 1998, a decision was made to eliminate Bennington's position. Caterpillar states the decision to eliminate Bennington's position was prompted by its efforts to eliminate managers and supervisors that were not supportive of the "Vision, Values, and Teamwork" initiatives being implemented in that area. (Def.'s Stat. ¶51.) Bennington asserts this is a fabricated excuse for eliminating the position. (Pl.s Resp. ¶51.)

At any rate, Bennington's position was eliminated, however, Bennington was not terminated. Instead, Bennington was transferred to the Special Projects Group. (Def.'s Stat. ¶54.) Bennington states the Special Projects Unit was commonly referred to as waste management, a term used to describe when employees were moved into vacated buildings or empty work areas and given no assignments. (Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment, Doc. #42 at 5 [hereinafter Pl.'s Opp.]) Accordingly, Bennington was assigned to an empty work area and told to look for other work. (Pl's Opp. At 6.) Still, Bennington remained at the same grade level after the transfer and his pay and benefits did not change. (Def.'s Stat. ¶57.)

While assigned to the Special Projects Group, Bennington compiled information for a Caterpillar newsletter. (Def.'s Stat. ¶63.) This took approximately one hour per week. (Plaintiff's Statement of Undisputed Facts, Doc. #43, ¶18.) Bennington also spent some time learning software and took a training course titled "Zodiac - The Game of Business Finance & Strategy". (Def.'s Stat. ¶64.)

Shortly after he was transferred, Bennington indicated to his supervisor that he was contemplating retirement. (Def.'s Stat. ¶65.) Bennington states this decision was motivated by his belief that he had lost all protections under the Caterpillar Salaried Employment Security Program as a result of his negative performance evaluation. (Pl.'s Stat. ¶14.) Furthermore, Bennington contends that his bad review prevented further advancement in the company (Pl.'s Stat. ¶17.) And placed him in fear of being discharged. (Pl.'s Stat. ¶14.) Consequently, Bennington announced his retirement in April of 1998, stopped working on May 6, 1998, and officially retired in July of 1998. (Pl.'s Resp. ¶65.)

After his retirement, Bennington filed this lawsuit alleging Caterpillar violated the Age Discrimination in Employment Act by transferring him (Count I), by constructively discharging him (Count II), and by creating a hostile work environment (Count III). Bennington also alleges Caterpillar intentionally inflicted emotional distress, an actionable tort under Illinois law (Count IV). Caterpillar has filed a motion for summary judgment and Bennington has responded.

ANALYSIS

MOTION TO REOPEN DISCOVERY

On August 10, 2000, Bennington filed a Motion to Amend Discovery Deadline to allow the depositions of John Kamp and Donald Evans. Prior to this motion, the discovery deadline had already been changed from July 7 to August 14. On August 14, 2000, Magistrate Judge Gorman denied Bennington's motion to extend the discovery deadline, however, it appears Bennington was able to obtain the depositions of John Kamp and Donald Evans. Bennington did not object to the Magistrate's order within the 10 days allowed under Local Rule 72.2(A). Now, Bennington asks this Court to re-open discovery so he can depose three more witnesses. In support of his motion, Bennington states that newly discovered facts derived from the depositions of John Kamp and Donald Evans make these new depositions necessary. Specifically, Bennington states that Donald Evans admitted to changing the performance evaluation of John Kamp after it had been signed, however, he denied changing the review of Jerry Siwicke. Bennington further states that Jerry Siwicke has repeatedly stated that Donald Evans changed his annual review. Because of this conflict, Bennington states three more depositions are warranted.

The Court will deny Bennington's request to re-open discovery. While Bennington has pointed to a conflict in the testimony of two deponents, he has failed to show how this is relevant to his case. Furthermore, Caterpillar has admitted that it is common practice for higher-ups to review and alter performance evaluations written by the employees immediate supervisor, thus, eliminating the need for further depositions on this point. For these reasons, the Court finds Bennington will not be prejudiced if the additional depositions are not taken. Therefore, his motion to re-open discovery is denied.

MOTION FOR SUMMARY JUDGMENT

Summary judgment should be granted where "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party has the responsibility of informing the Court of portions of the record of affidavits that demonstrate the absence of a triable issue. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The moving party may meet its burden of showing an absence of disputed material facts by demonstrating "that there is an absence of evidence to support the non-moving party's case." Id. At 325. Any doubt as to the existence of a genuine issue for trial is resolved against the moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242,255 (1986); Cain v. Lane, 857 F.2d 1139, 1142 (7th Cir. 1988).

If the moving party meets its burden, the non-moving party then has the burden of presenting specific facts to show that there is a genuine issue of material fact. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.475 U.S. 574, 586-87 (1986). Federal Rule of Civil Procedure 56(e) requires the non-moving party to go beyond the pleadings and produce evidence of a genuine issue for trial. Celotex, 477 U.S. at 324. Nevertheless, this Court must "view the record and all inferences drawn from it in the light most favorable to the [non-moving party]. Holland v. Jefferson Nat. Life Ins. Co., 883 F.2d 1307, 1312 (7th Cir. 1989). Summary judgment will be denied where a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Hedberg v. Indiana Bell Tel. Co., 47 F.3d 928, 931 (7th Cir. 1995).

I. AGE DISCRIMINATION CLAIMS

In his Complaint, Bennington alleges that Caterpillar violated the Age Discrimination in Employment Act (ADEA) by transferring him to the Special Projects Unit (Count I), by constructively discharging him (Count II), and by creating a hostile work environment (Count III). Under the ADEA, it is "unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1); Reeves v. Sanderson Plumbing Products, 120 S.Ct. 2097, 2105 (2000). When a plaintiff alleges disparate treatment, "liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision." Hazen Paper Co. v. Biggins, 507 U.S. 604, 610, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993); Reeves at 2105. In other words, the plaintiff's age must have "actually played a role in [the employer's decision making] process and had a determinative influence on the outcome." Id.

To prove age discrimination, plaintiffs can meet their burden on summary judgment through either the direct burden method or the indirect burden-shifting approach. See Reeves at 2105. In the instant action, Bennington has not offered any direct evidence of Defendant's illegal motive in transferring him. The Seventh Circuit defined direct evidence as "'evidence that can be interpreted as an acknowledgment of discriminatory intent by the defendant or its agents.'" Hill v. Burrell Communication Group, Inc., 67 F.3d 734, 736 (7th Cir. 1995) (quoting Troupe v. May Dep't Stores, Co., 20 F.3d 734, 736 (7th Cir. 1994). An example of direct evidence of discrimination is found in Mojica v. Gannett Co., 7 F.3d 552 (7th Cir. 1993) (en banc). IN that case, "the plaintiff was told that she was not promoted because she was not a black male." Hill, 67 F.3d at 667 (citing Mojica, 7 F3d at 561). Bennington presents no such evidence here.

Thus, the Court must analyze Bennington's claims under the familiar three-step model of McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973). See Reeves at 2105. First, Bennington must establish a *prima facie* case of intentional age discrimination. IN order to establish a *prima facie* case regarding his disparate treatment claim, Bennington must prove he was: (1) in a protected class; (2) performing his job satisfactorily; (3) the subject of a materially adverse employment action; and (4) other substantially younger employees were treated more favorably. See Gonzolez v. Ingersoll Milling Machine Co., 133 F.3d 1025, 1031 (7th Cir. 1998); Hartley v. Wisconsin Bell, Inc., 124 F.3d 887, 892 (7th Cir. 1997). See also Reves at 2106. Once Plaintiff establishes a *prima facie* case, it creates a rebuttable presumption of discrimination, and the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for its allegedly biased employment decision. Johnson v. City of Forte Wayne, 91 F.3d 922, 931 (7th Cir. 1996); See also Reeves at 2106. Once the defendant produces a legitimate reason, the plaintiff bears the burden of showing that the defendant's proffered reason is pretextual and that the employer's actual reason was discriminatory. See Reeves at 2106.

With regard to a *prima facie* case of age discrimination, Caterpillar argues that Bennington cannot show two elements: (1) that he suffered a materially adverse employment action; and (2) that he was treated less favorably than other similarly situated substantially younger employees. In addition, Caterpillar suggests Bennington was not performing his job satisfactorily prior to his transfer, however, it offers this allegation as a legitimate business reason for transferring him and not as proof that Bennington has not met his *prima facie* case. Caterpillar does not dispute that Bennington is a member of a protected class.

Under Seventh Circuit precedent "a materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities." Crady v. Liberty Nat'l Bank & Trust Co., 993 F.2d 132, 136 (7th Cir. 1993). "A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." Id. Still, "[n]ot everything that makes an employee unhappy is an actionable adverse action." Smart v. Ball State Univ., 89 F.3d 437, 441 (7th Cir. 1996). "[Adverse job actions can include changes that do not involve quantifiable losses in pay or benefits." Fortier v.

Mobile Communications, Inc., 161 F.3d 1106, 1111 (7th Cir. 1998). "For example, in Collins v. Illinois, 830 F.2d 692, 703-04 (7th Cir. 1987), an adverse job action was found when an employee was moved to a new department where here supervisors did not even know what her job entailed, she lost her office, phone, and business cards, and she was assigned to a receptionist-type desk." Dahm v. Flynn, 60 F.3d 253, 258 (7th Cir. 1994). Similarly, terminating supervisory authority over other employees could constitute an adverse employment action. Id. At 258.

Caterpillar argues that Bennington did not suffer an adverse employment action because he maintained the same compensation, benefits, and grade level after the transfer. Caterpillar also points to the fact that Bennington was allowed to participate in computer training and other courses to improve his job skills while he was in the Special Projects Unit. However, Bennington was given no assignments while assigned to the Special Projects Unit and was told to seek out his own work. Furthermore, he lost his supervisory and management responsibilities and was transferred to an empty work area. It appears the only thing that did not change after the transfer was Bennington's compensation package. Under these circumstances, a reasonable jurist could find that Bennington was subject to a material adverse employment action.

On the other hand, Bennington has failed to meet his burden in proving that he was treated less favorably than other similarly situated employees who were substantially younger. "[T]he *prima facie* case under the ADEA require[s] a sufficient disparity in ages between the plaintiff and those allegedly favored over [him]." Hartley v. Wisconsin Bell, Inc., 124 F.3d 887, 892 (7th Cir. 1997). In Hartley, 124 at 893, the Seventh Circuit stated "we consider a ten-year difference in ages (between the plaintiff and her replacement) to be presumptively 'substantial' under O'Connor." However, they also stated that "[i]n cases where the [age] disparity is less, the plaintiff still may present a triable claim if [he] directs the court to evidence that [his] employer considered [his] age to be significant." Hartley, 124 F.3d at 893.

In this case, Bennington claims that Perry Lubber, the manager that took over Bennington's responsibilities, is a similarly situated employee who is substantially younger. However, there is only a five year age difference between Perry Lubbers and Bennington. Moreover, Bennington has failed to point to any facts that would indicate Caterpillar considered his age to be significant in their decision to transfer him. Furthermore, the Seventh Circuit has found bigger age differences to be insubstantial. See Hartley, 124 at 892 (seven year gap not substantial). Therefore, the Court finds that Bennington has failed to present specific facts to show a genuine issue of material fact as to whether similarly situated employees who were substantially younger than him were treated more favorably. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). Thus, summary judgment is appropriate.

Finally, Bennington's constructive discharge claim and harassment claims are based on the same facts supporting his disparate treatment claim. Both of these claims are directed to the working conditions in the Special Projects Unit. However, Bennington does not claim the conditions were intolerable because of his age or that employees in this unit were treated differently because of their age. He only claims he was transferred to this unit because of his age. Therefore, summary judgment as to these claims is also appropriate.

II. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIM

In Count IV of his original complaint, Bennington alleges Caterpillar intentionally inflicted emotional distress by making changes to Bennington's performance review. Caterpillar argues this claim is preempted by the Illinois

Human Rights Act (IHRA) and that Bennington has failed to meet his burden in proving intentional infliction of emotional distress. The Court agrees that Bennington has failed to meet his burden in proving this tort and therefore need not address whether this claim is preempted by the IHRA.

The elements of intentional infliction of emotional distress are (1) "the conduct involved must be truly extreme and outrageous," (2) the actor must either intend that his conduct inflict severe emotional distress, or know that there is at least a high probability that his conduct will cause severe emotional distress, and (3) the conduct must in fact cause severe emotional distress." McGrath v. Fahey, 533 N.E.2d 806, 809 (Ill. 1988). To prevail, Plaintiff's emotional distress must be "so severe that no reasonable man could be expected to endure it. The intensity and duration of the distress are factors to be considered in determining its severity." Id. (quoting Restatement (Second) of Torts § 46, comment j).

In his complaint, Bennington states he suffered severe emotional distress. In their motion for summary judgment, Caterpillar argues that Bennington cannot prove he suffered any such injury. In his response, Bennington argues his injuries need not "result in physical injury or the threat of physical injury." Holder v. Invaniack, 39 F.Supp.2d 965, 969 (N.D. Ill. 1999); however, Bennington fails to point to any facts that would indicate he has suffered any emotional distress at all. Furthermore, the Court can find no facts on the record to indicate Bennington has suffered legally cognizable emotional distress. As the Seventh Circuit has stated, Bennington "cannot leave it to this court to scour the record in search of factual or legal support for this claim." Colburn v. Trustees of Indiana Univ., 973 F.2d 581, 593 (7th Cir.) 1992). Accordingly, Bennington's argument as to whether he has suffered severe emotional distress is waived. See Finance Inventment Co. v. Geberit AG, 165 F.3d 526, 529 (7th Cir.

1998) (perfunctory and undeveloped argument waived). Therefore, summary judgment is appropriate as to this claim.

CONCLUSION

IT IS THEREFORE ORDERED that Defendant's Motion for Summary Judgment (Doc. #35) is GRANTED.

IT IS FURTHER ORDERED that Plaintiff's Motion to Re-Open Discovery (Doc. #40) is DENIED.

CASE TERMINATED.

ENTERED this 12th day of January, 2001.

/s/ Joe B. McDade
JOE BILLY MCDADE
Chief United States District Judge

29 USCA § 623

(a) Employer practices

It shall be unlawful for an employer--
(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
(3) to reduce the wage rate of any employee in order to comply with this chapter.

(b) Employment agency practices

It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

(c) Labor organization practices

It shall be unlawful for a labor organization--
(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;
(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such

individual's age;
(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

(e) Printing or publication of notice or advertisement indicating preference, limitation, etc.

It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization--

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section--

(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this chapter, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(B) to observe the terms of a bona fide employee benefit plan--

(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under
________________________ (as in effect on June 22, 1989); or

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter.

Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title, because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (A), or under clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter; or

(3) to discharge or otherwise discipline an individual for good cause.

(g) Repealed.
Dec. 19, 1989, 103 Stat. 2233

(h) Practices of foreign corporations controlled by American employers; foreign employers not controlled by American employers; factors determining control

(1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.

(2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.

(3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the--

(A) interrelation of operations,
(B) common management,
(C) centralized control of labor relations, and
(D) common ownership or financial control,

of the employer and the corporation.

(i) Employee pension benefit plans; cessation or reduction of benefit accrual or of allocation to employee account; distribution of benefits after attainment of normal retirement age; compliance; highly compensated employees

(1) Except as otherwise provided in this subsection, it shall be unlawful for an employer, an employment agency, a labor organization, or any combination thereof to establish or maintain an employee pension benefit plan which requires or permits--

(A) in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age, or

(B) in the case of a defined contribution plan, the cessation of allocations to an employee's account, or the reduction of the rate at which amounts are allocated to an employee's account, because of age.

(2) Nothing in this section shall be construed to prohibit an employer, employment agency, or labor organization from observing any provision of an employee pension benefit plan to the extent that such provision imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan.

(3) In the case of any employee who, as of the end of any plan year under a defined benefit plan, has attained normal retirement age under such plan--

(A) if distribution of benefits under such plan with respect to such employee has commenced as of the end of such plan year, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of the actuarial equivalent of in-service distribution of benefits, and

(B) if distribution of benefits under such plan with respect to such employee has not commenced as of the end of such year in accordance with section 1056(a)(3) of this title and section 401(a)(14)(C) of Title 26, and the payment of benefits under such plan with respect to such employee is not suspended during such plan year pursuant to section 1053(a)(3)(B) of this title or section 411(a)(3)(B) of Title 26, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of any adjustment in the benefit payable under the plan during such plan year attributable to the delay in the distribution of benefits after the attainment of normal retirement age.

The provisions of this paragraph shall apply in accordance with regulations of the Secretary of the Treasury. Such regulations shall provide for the application of the preceding provisions of this paragraph to all employee pension benefit plans subject to this subsection and may provide for the application of such provisions, in the case of any such employee, with respect to any period of time within a plan year.

(4) Compliance with the requirements of this subsection with respect to an employee pension benefit plan shall constitute compliance with the requirements of this section relating to benefit accrual under such plan.

(5) Paragraph (1) shall not apply with respect to any employee who is a highly compensated employee (within the meaning of section 414(q) of Title 26) to the extent provided in regulations prescribed by the Secretary of the Treasury for purposes of precluding discrimination in favor of highly compensated employees within the meaning of subchapter D of chapter 1 of Title 26.

(6). A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the subsidized portion of any early retirement benefit is disregarded in determining benefit accruals or it is a plan permitted by subsection (m) of this section..

(7) Any regulations prescribed by the Secretary of the Treasury pursuant to clause (v) of section 411(b)(1)(H) of Title 26 and

subparagraphs (C) and (D) of section 411(b)(2) of Title 26 shall apply with respect to the requirements of this subsection in the same manner and to the same extent as such regulations apply with respect to the requirements of such sections 411(b)(1)(H) and 411(b)(2).

(8) A plan shall not be treated as failing to meet the requirements of this section solely because such plan provides a normal retirement age described in section 1002(24)(B) of this title and section 411(a)(8)(B) of Title 26.

(9) For purposes of this subsection--

(A) The terms "employee pension benefit plan", "defined benefit plan", "defined contribution plan", and "normal retirement age" have the meanings provided such terms in section 1002 of this title.

(B) The term "compensation" has the meaning provided by section 414(s) of Title 26.

(j) Employment as firefighter or law enforcement officer

It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken--

(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer, the employer has complied with section 3(d)(2) of the Age Discrimination in Employment Amendments of 1996 if the individual was discharged after the date described in such section, and the individual has attained--

(A) the age of hiring or retirement, respectively, in effect under applicable State or local law on March 3, 1983; or

(B)(i) if the individual was not hired, the age of hiring in effect on the date of such failure or refusal to hire under applicable State or local law enacted after September 30, 1996; or

(ii) if applicable State or local law was enacted after September 30, 1996, and the individual was discharged, the higher of--
(I) the age of retirement in effect on the date of such discharge under such law; and
(II) age 55; and
(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter.

(k) Seniority system or employee benefit plan; compliance

A seniority system or employee benefit plan shall comply with this chapter regardless of the date of adoption of such system or plan.

(l) Lawful practices; minimum age as condition of eligibility for retirement benefits; deductions from severance pay; reduction of long-term disability benefits

Notwithstanding clause (i) or (ii) of subsection (f)(2)(B) of this section--
(1) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because--
(A) an employee pension benefit plan (as defined in section 1002(2) of this title) provides for the attainment of a minimum age as a condition of eligibility for normal or early retirement benefits; or
(B) a defined benefit plan (as defined in section 1002(35) of this title) provides for--
(i) payments that constitute the subsidized portion of an early retirement benefit; or
(ii) social security supplements for plan participants that commence before the age and terminate at the age (specified by the plan) when participants are eligible to receive reduced or unreduced old-age insurance benefits under title II of the Social Security Act (et seq.), and that do not

exceed such old-age insurance benefits.

(2)(A) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because following a contingent event unrelated to age--

(i) the value of any retiree health benefits received by an individual eligible for an immediate pension;

(ii) the value of any additional pension benefits that are made available solely as a result of the contingent event unrelated to age and following which the individual is eligible for not less than an immediate and unreduced pension; or

(iii) the values described in both clauses (i) and (ii);

are deducted from severance pay made available as a result of the contingent event unrelated to age.

(B) For an individual who receives immediate pension benefits that are actuarially reduced under subparagraph (A)(i), the amount of the deduction available pursuant to subparagraph (A)(i) shall be reduced by the same percentage as the reduction in the pension benefits.

(C) For purposes of this paragraph, severance pay shall include that portion of supplemental unemployment compensation benefits (as described in section 501(c)(17) of Title 26) that--

(i) constitutes additional benefits of up to 52 weeks;

(ii) has the primary purpose and effect of continuing benefits until an individual becomes eligible for an immediate and unreduced pension; and

(iii) is discontinued once the individual becomes eligible for an immediate and unreduced pension.

(D) For purposes of this paragraph and solely in order to make the deduction authorized under this paragraph, the term "retiree health benefits" means benefits provided pursuant to a group health plan covering retirees, for which (determined as of the contingent event unrelated to age)--

(i) the package of benefits provided by the employer for the retirees who are below age 65 is at least comparable to benefits

provided under title XVIII of the Social Security Act (
__________ et seq.);

(ii) the package of benefits provided by the employer for the retirees who are age 65 and above is at least comparable to that offered under a plan that provides a benefit package with one-fourth the value of benefits provided under title XVIII of such Act; or

(iii) the package of benefits provided by the employer is as described in clauses (i) and (ii).

(E)(i) If the obligation of the employer to provide retiree health benefits is of limited duration, the value for each individual shall be calculated at a rate of $3,000 per year for benefit years before age 65, and $750 per year for benefit years beginning at age 65 and above.

(ii) If the obligation of the employer to provide retiree health benefits is of unlimited duration, the value for each individual shall be calculated at a rate of $48,000 for individuals below age 65, and $24,000 for individuals age 65 and above.

(iii) The values described in clauses (i) and (ii) shall be calculated based on the age of the individual as of the date of the contingent event unrelated to age. The values are effective on October 16, 1990, and shall be adjusted on an annual basis, with respect to a contingent event that occurs subsequent to the first year after October 16, 1990, based on the medical component of the Consumer Price Index for all-urban consumers published by the Department of Labor.

(iv) If an individual is required to pay a premium for retiree health benefits, the value calculated pursuant to this subparagraph shall be reduced by whatever percentage of the overall premium the individual is required to pay.

(F) If an employer that has implemented a deduction pursuant to subparagraph (A) fails to fulfill the obligation described in subparagraph (E), any aggrieved individual may bring an action for specific performance of the obligation described in subparagraph (E). The relief shall be in addition to any other remedies provided under Federal or State law.

(3) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because an employer provides a bona fide employee benefit plan or plans under which long-term disability benefits received by an individual are reduced by any pension benefits (other than those attributable to employee contributions)--

(A) paid to the individual that the individual voluntarily elects to receive; or

(B) for which an individual who has attained the later of age 62 or normal retirement age is eligible.

(m) Voluntary retirement incentive plans

Notwithstanding subsection (f)(2)(b), it shall not be a violation of subsection (a), (b), (c), or (e) solely because a plan of an institution of higher education (as defined in section 1001 of Title 20) offers employees who are serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure) supplemental benefits upon voluntary retirement that are reduced or eliminated on the basis of age, if--

(1) such institution does not implement with respect to such employees any age-based reduction or cessation of benefits that are not such supplemental benefits, except as permitted by other provisions of this chapter;

(2) such supplemental benefits are in addition to any retirement or severance benefits which have been offered generally to employees serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure), independent of any early retirement or exit-incentive plan, within the preceding 365 days; and

(3) any employee who attains the minimum age and satisfies all non-age-based conditions for receiving a benefit under the plan has an opportunity lasting not less than 180 days to elect

to retire and to receive the maximum benefit that could then be elected by a younger but otherwise similarly situated employee, and the plan does not require retirement to occur sooner than 180 days after such election.

29 USCA § 631

(a) Individuals at least 40 years of age

The prohibition in this chapter shall be limited to individuals who are at least 40 years of age.

(b) Employees or applicants for employment in Federal Government

In the case of any personnel action affecting employees or applicants for employment which is subject to the provisions of section 633a of this title, the prohibitions established in section 633a of this title shall be limited to individuals who are at least 40 years of age.

(c) Bona fide executives or high policymakers

(1) Nothing in this chapter shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age and who, for the 2-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in the aggregate, at least $44,000.

(2) In applying the retirement benefit test of paragraph (1) of this subsection, if any such retirement benefit is in a form other than a straight life annuity (with no ancillary benefits), or if employees contribute to any such plan or make rollover contributions, such benefit shall be adjusted in accordance with

regulations prescribed by the Equal Employment Opportunity Commission, after consultation with the Secretary of the Treasury, so that the benefit is the equivalent of a straight life annuity (with no ancillary benefits) under a plan to which employees do not contribute and under which no rollover contributions are made.

RULE 30.1 SCHEDULING OF DEPOSITIONS

In scheduling any deposition, counsel must make a good faith effort to coordinate with all opposing counsel the scheduling of a time that is mutually convenient to all opposing counsel and parties. The signing and serving of a Notice of Deposition shall constitute a certification by the attorney signing and serving the Notice of Deposition that the attorney has complied with this rule.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

JAMES BENNINGTON,)
)
Plaintiff,)
)
vs.) Case No. 99 CV 1111
)
CATERPILLAR, INC.,)
)
Defendant.)

MOTION TO RECONSIDER

NOW COMES JAMES BENNINGTON, Plaintiff, by his attorney, WILLIAM M. ANDERSON IV, and in support of his Motion to Reconsider this Court's Order and Judgment of January 12, 2001, states as follows:

I

BACKGROUND

That the within Order of January 12, 2001 contains several errors in its interpretation of the facts as contained in the "background" section of said Order in that several key facts have been either inadvertently disregarded by this Court or are a disputed fact and this Court has failed to consider these facts in the light most favorable to Plaintiff in rendering its decision on Defendant's Motion for Summary Judgment, to wit:

1. As stated on page one (1) of this Court's Order of January 12, 2001, it is true that Caterpillar, Inc. (hereinafter referred to as "Caterpillar") hired James Bennington in 1965 as a machine shop apprentice. This factual background as stated on page one (1) and two (2) of this Court's Order of January 12, 2001, however, fails to note that James Bennington

received a steady stream of favorable reviews, promotions and advancements during his tenure at Caterpillar. (See Bennington Caterpillar employee history folder contents from 1988 through 1998, Exhibit "A" of Pl. Mem. in Opposition to Motion for Summary Judgment and Exhibit "C" of Bennington Decl. and Holloman Decl.) Said factual background also fails to reflect that James Bennington never, during his entire employment history with Caterpillar, received an unfavorable review until Paul Wroblewski changed the review written by James Bennington's immediate supervisor, Jerry Holloman, in December, 1997. (See Bennington Caterpillar employee history folder contents from 1988 through 1998, Exhibit "A" of Plaintiff's Mem. in Opposition to Motion for Summary Judgment and Exhibit "C" of Bennington Decl. and Holloman Decl.)

2. The Court is correct in its statement that in 1989, James Bennington was transferred from first shift to second shift to supervise the assembly area, however, the Court fails to note that the reason for this transfer was to trouble shoot problems that had arisen on second shift and, further, that James Bennington's 1989 employment review credited him for significant reductions in costs and increases in efficiencies including praising James Bennington for "past due engines at the lowest level in the building history" and naming him as a "prime contributor" to these results. (Bennington - employee performance review - 1989, Bennington Caterpillar employee history folder contents from 1988 through 1998, Exhibit "A" of Plaintiff's Mem. in Opposition to Motion for Summary Judgment, Holloman Decl.)

3. In the first paragraph of page two (2) of the above referenced Order, the Court states that "In the mid-1990s, Bennington's title changed to unit manager. (DEF's Stat. ¶ 18)" In fact, this was not only a title change but a promotion. (See September 12, 1995 interoffice memo in Bennington Caterpillar employee history folder contents from

1988 through 1998, Exhibit "A" of Plaintiff's Mem. in Opposition to Motion for Summary Judgment) The Court's statement of facts is correct in stating that in 1996 Bennington's position was eliminated and he was transferred to another area as a trouble shooter to help reduce engine assembly defects. However, the Court fails to note that James Bennington received an extremely good year end review for that trouble shooting job. (See Bennington Caterpillar employee history folder contents from 1988 through 1998, Exhibit "A" of Plaintiff's Memorandum in Opposition to Motion for Summary Judgment)

4. The Court is correct in its statement that after James Bennington was transferred to Building DD, Caterpillar implemented a "Vision, Values, and Teamwork" initiative which was designed to bring a team based management structure to the division where James Bennington worked. The Court, however, fails to note that the Vision, Values, and Teamwork initiative came about because of recommendations of the Crosby team of consultants who where hired by Caterpillar to help improve the Caterpillar management structure. (See pages 191 through 194 of Bennington Dep.) The Court also fails to note that James Bennington was extremely supportive and active in his support of the Crosby initiatives and, in fact, was complemented in his year end review for the year of 1997 by his immediate supervisor, Jerry Holloman, and was found to have saved Caterpillar Two Hundred and Forty Thousand Dollars ($240,000.00) through his implementation of the Crosby Vision, Values, and Teamwork initiatives. James Bennington was a leader in the implementation of the Crosby Vision, Values, and Teamwork initiatives. (See 1997 employee review document No. IDENT 74492 - additional information section at bottom of document in Bennington Caterpillar employee history folder contents from 1988 through 1998, Exhibit "A" of Plaintiff's

Memorandum in Opposition to Motion for Summary Judgment and Bennington Decl. ¶ 14)

5. Caterpillar's position as reflected by the statements of Paul Wroblewski were that James Bennington did not support the Vision, Values, and Teamwork initiative, however, this position is refuted by the statements of James Bennington, the affidavit of Jerry Holloman, and the written records of Caterpillar, which state that James Bennington was a supporter of the Crosby initiative and recognized that James Bennington saved Caterpillar Two Hundred and Forty Thousand Dollars ($240,000.00) through his implementation of these initiatives. (See Holloman Decl., Bennington Dep. and 1997 employee review document No. IDENT 74492 - additional information section at bottom of document in Bennington Caterpillar employee history folder contents from 1988 through 1998, Exhibit "A" of Plaintiff's Memorandum in Opposition to Motion for Summary Judgment)

6. As such, in considering this matter in a Motion for Summary Judgment, this Court must assume, for the purpose of the pending motion, that James Bennington was a recognized active supporter of the above initiatives and that James Bennington saved the company a substantial amount of money through the use of these initiatives. Caterpillar's claim that James Bennington was not a supporter of these initiatives must be disregarded for purposes of this motion because of the fact that said issue is at the very least, in legitimate dispute. Indeed, all written records and competent testimony from people who actually supervised James Bennington's work on a daily basis, indicates these issues are clearly to be resolved in favor of Plaintiff, James Bennington. (See Bennington Caterpillar employee history folder contents from 1988 through 1998, Exhibit "A" of Plaintiff's Mem. in Opposition to Motion for Summary Judgment and Holloman Decl.)

7. In the Court's statement of facts contained in the first paragraph of page three (3) the Court correctly states that the

date that Bennington was transferred to the commercial work area is in dispute by the parties. It would be a more correct statement of fact to state that sometime after the transition of the assembly work from Building B to Building DD, the commercial assembly work area, which was supervised by Charles Gene Duchardt was recognized to be falling in serious trouble which would result in failure to meet shipping deadlines that were coming due. Jerry Holloman, recognizing that a problem existed in the commercial assembly area, asked James Bennington, as a trouble shooter, to assume responsibility for that area and to do what was necessary to fix the problems in the commercial assembly area. This all took place on or after June 1, 1997. (See Holloman Decl., 1997 Bennington performance review and pages 73 through 75 of Bennington Dep.)

8. Caterpillar's assertion that Bennington was transferred prior to May of 1997, and thus, may have been responsible for the area getting in "trouble" is an allegation that is only supported by the testimony of Paul Wroblewski. Bennington's position that Caterpillar intentionally discriminated against him is supported by the false claims made by Paul Wroblewski in an attempt to create false reasons for the removal of Bennington to waste management. Clearly Paul Wroblewski lied in his deposition when attempting to characterize Bennington as the problem in the commercial assembly are rather than the fixer or troubleshooter for this area. (See Bennington Caterpillar employee history folder contents from 1988 through 1998, Exhibit "A" of Plaintiff's Mem. in Opposition to Motion for Summary Judgment, 1997 Employee Review, Holloman Decl. and ¶ 14 of Wroblewski Decl.) Caterpillar even went so far as to deceptively claim in Bennington's 1998 employee review that the move to "Special Assignment" (waste management) was by "mutual agreement".

9. As a clearly disputed fact, this dispute, for the purposes of Motion for Summary Judgment, must be assumed to be resolved in favor of James Bennington and this Court's

decision should be based upon the assumption that James Bennington was an excellent employee who was, in fact, being brought in to correct the problems created by another employee, rather than Caterpillar's attempted assertion that James Bennington caused the problems in the commercial assembly area. Obviously, Jerry Holloman, the man who gave James Bennington the job of correcting the problems in the commercial assembly area would be the man with the most knowledge about when James Bennington was given the responsibility for this area and the reason. Jerry Holloman's testimony as reflected in his affidavit, clearly shows that Bennington was "the best man available". (See page 22 of Holloman Decl.) It is important to note that Jerry Holloman, in his review of James Bennington's performance, stated that "Jim, no one could have done it any better." (See ¶ 30 of Holloman Decl.)

10. At the bottom of page three (3) of this Court's decision, the Court states that there is a dispute between James Bennington and Jerry Holloman regarding the language in the annual review that Holloman put in said review which stated that "Eight D teams or FMEA activities should be implemented in his next year's plan." (See 1997 employee review and Bennington Caterpillar employee history folder contents from 1988 through 1998, Exhibit "A") It is clear that this issue is in dispute and, thus, it must be considered in James Bennington's favor for purposes of this motion. As such, this Court must assume that James Bennington was not criticized by Holloman by this statement in his annual review. This is consistent with the other statements made by Holloman in preparing what has been termed an extremely good review of James Bennington's performance for the year 1997, before said annual review received a hatchet job by Paul Wroblewski who, quite obviously, had no direct knowledge of what job James Bennington was hired to do or his performance on that job.

11. This Court must consider all of Paul Wroblewski's negative statements to be completely disregarded

in its consideration of this motion because of the fact that all of these negative statements have been directly controverted by Caterpillar records, the statements of James Bennington and the affidavit of Jerry Holloman. (See Bennington Caterpillar employee history folder contents from 1988 through 1998, Exhibit "A" of Plaintiff's Mem. in Opposition to Motion for Summary Judgment, Bennington Decl., Holloman Decl. and Bennington Dep.) In short, it is a mistake for this Court to assume that James Bennington was anything other than an exemplary employee who was not only skilled in his area of management but was of such a skill level that he could also be called upon to come into areas where other managers had failed and turn their failures into successes. As stated by Jerry Holloman, there was no work or performance related reason for changing James Bennington's 1997 annual review. (See ¶ 48 of Holloman Decl.) This statement by Holloman must be considered as a fact in consideration of this motion.

12. These facts are also supported by the fact that Jerry Holloman received a very favorable review for the year 1997. (See ¶ 31 of Holloman Decl.) It is only logical to conclude that if James Bennington, a subordinate of Jerry Holloman, had failed seriously in a major area such as the commercial assembly area, then his supervisor would have logically shared some of this blame and it would have been reflected on the supervisor's annual review. The supervisor, Jerry Holloman, received a very favorable annual review, thus further supporting James Bennington's position in this matter. (See ¶ 31 of Holloman Decl.) Caterpillar has never refuted the fact that Jerry Holloman received a favorable annual review for 1997.

13. In the first paragraph of page four (4) of this Court's decision, it makes the statement that it is the general practice of Mossville managers to review performance evaluations prepared by subordinates. This statement is correct, however, it is also the general practice of managers at Caterpillar

to discuss any changes they wish to make in these evaluations with the author of the performance evaluation prior to making any changes. (See ¶ 33 of Holloman Decl. and Evans Dep. pages 23 - 24) It is clear from the testimony in this case that Paul Wroblewski had several weeks to discuss any changes he wished to make in James Bennington's review with Jerry Holloman and never reviewed these items with him. There is no testimony to the effect that it was impossible for Paul Wroblewski to discuss these changes before the retirement of Jerry Holloman. According to the testimony of Jerry Holloman and James Bennington, Jerry Holloman prepared Bennington's evaluation and delivered it to Paul Wroblewski after execution by Bennington on December 8, 1997, (¶ 36 and 37 of Holloman Decl.), and Jerry Holloman did not leave Caterpillar employment until December 19, 1997, approximately ten days after completion of the Bennington 1997 review. (¶ 2 and 3 of Holloman Decl. {October 3, 2000})

14. The Court also fails to note that Caterpillar departed from normal Caterpillar policy in not reviewing James Bennington's annual report with the author of that report. (See ¶ 33 of Holloman Decl., Evans Dep. pages 23 - 24, and pages 7 - 9 of Kamp Dep.) The Court also fails to note that Don Evans failed to follow Caterpillar policy regarding another elderly manager that was placed in waste management along with James Bennington when Don Evans changed the evaluation written by Mark Spielmann and did a hatchet job on the review of John Kamp. (See ¶ 19 - 26 of Kamp Dep.) Thus, the facts, as must be assumed by this Court, are that Caterpillar violated its own policy as to both of these employees who were in a protected class and both of whom were placed in waste management by Caterpillar, together.

15. The Court also failed to note the significance of changing an employee's review after it had been through the sign line and placed in the employee's history folder. Clearly, once a review has been written and has been signed off by all superiors

and placed in an employee's personnel folder, it is wrong to pull that review out of the employee's folder and then change it to a negative review. The fact that this did happen to another employee who was in a protected class and was one of the people placed in waste management together with Bennington is a critical fact which must be considered and not ignored by this Court as it shows Caterpillar's improper course of conduct and Caterpillar's desperation to create a negative written record on the employees Caterpillar wished to discriminate against. It is the crux of Plaintiff's theory that Caterpillar engaged in a course of conduct toward a group of employees of which Plaintiff was a member to fraudulently create unfavorable annual reports to deprive these employees of the protection of the Caterpillar salary security protection program so that these employees would be in fear of losing the pensions and other benefits to which many of these men had worked their entire lives to accumulate. Thus, this Court must consider all evidence which tends to reflect that Caterpillar was improperly changing these annual reviews of the men who were placed in waste management.

16. The fact that Caterpillar was willing to bargain and deal in performance reviews is further evidence of the fact that Caterpillar was playing games with employee's annual performance reviews in order to coerce the employee's retirement. John Kamp's 1997 annual employee review was improperly altered after it had been through the sign line and placed in his employee personnel history folder from a favorable review to an unfavorable review which might have robbed him of his employee protections under the employees salary security protection program. (See P. 14 - 28 of Kamp Dep.) Then, when John Kamp was willing to retire because of his fears that he might lose his protections, Caterpillar was willing to change the review back to its original review. This can only lead to the conclusion that Caterpillar was not changing John Kamp's review because said review needed a correction but that Caterpillar was only changing this review to coerce John

Kamp's, and by example, others, retirement. If, in fact, John Kamp's original review that was sitting in his employee history folder was inaccurate, why would Caterpillar feel any compulsion or reason to change that review back to the original inaccurate review? The only possible answer is that Caterpillar was willing to change this review back to the original review because the original review was the accurate review. Clearly, the only reason these changes were made by Caterpillar were because Caterpillar was desperate to coerce the retirement of these elderly employees and was willing to take any improper actions necessary to accomplish their goals. Caterpillar made a deal with John Kamp to change his review back to a good review and give him discretionary monies that he would not have been given after they changed his review in return for his retirement. (See pages 14 and pages 35 - 36 of Kamp Dep.)

17. In the first paragraph of page four (4) the Court states that Caterpillar claims the changes to James Bennington's performance review were made because Paul Wroblewski believed Jerry Holloman's evaluation did not accurately reflect James Bennington's performance. Jerry Holloman states in his affidavit that he knows of no performance related reason why James Bennington's review would have been changed by Paul Wroblewski. (See ¶ 48 of Holloman Decl.) Thus, this Court is required to assume, for purposes of this motion, that there was no performance related reason for changing James Bennington's job performance review. This Court is also required to assume that James Bennington's assertion is correct that the changes were not made because of any performance deficits on his part. (Pl's Stat. ¶ 39)

18. In the last paragraph contained on page four (4) of the Court's decision, the Court states, at length, the negative items that were placed in James Bennington's 1997 performance evaluation by Paul Wroblewski. However, the Court fails to note that each of these negative items were refuted by James Bennington's immediate supervisor, Jerry Holloman, in his 1997

performance review and in his declaration. (See 1997 employee review, Bennington Caterpillar employee history folder contents from 1988 through 1998, Exhibit "A" of Plaintiff's Mem. in Opposition to Motion for Summary Judgment and ¶ 37 - 41 of Holloman Decl.) The Court also fails to note that James Bennington's extensive annual performance reviews never contained any negative comments of the type that Paul Wroblewski placed in the 1997 performance evaluation. Thus, Paul Wroblewski's negative comments are totally inconsistent with all of Benningtons prior years of performance reviews at Caterpillar. (See Bennington Caterpillar employee history folder contents from 1988 through 1998, Exhibit "A" of Plaintiff's Mem. in Opposition to Motion for Summary Judgment) In fact, the Court fails to note that this is the only negative performance review of James Bennington at Caterpillar and, as already stated, James Bennington's immediate supervisor, who received a favorable review for 1997 and prior years, stated there was no performance related reason for James Bennington to receive a negative review. (See ¶ 48 of Holloman Decl.) The Court also failed to note that the negative comments made by Paul Wroblewski on James Bennington's 1997 annual review are inconsistent with several other comments on this performance review. (See ¶ 41 of Holloman Decl.) In other words, Holloman's original review of James Bennington's performance is totally consistent with over thirty (30) years of work and performance reviews and Paul Wroblewski's negative comments are totally inconsistent with thirty (30) years of performance reviews received by James Bennington and also inconsistent with other comments in the same 1997 annual performance review. Once again, all of these disputed matters must be assumed by this Court to be resolved in favor of James Bennington in the consideration of the Motion for Summary Judgment.

19. Thus, this Court must assume for purposes of this motion that Paul Wroblewski intentionally changed James Bennington's performance review to a review which did not

reflect his performance for the year 1997. Once the Court has made this assumption, the only possible interpretation of this assumed fact would be that Paul Wroblewski was improperly changing an employee's annual evaluation in order to gain leverage on that elderly employee in order to coerce the employee's retirement. Once you consider the changes to the annual reviews, together with the adverse employment actions taken against this employee by placing him in waste management in an empty building with no work to perform and no employees to supervise and no job or pension security, you have a clear picture of Caterpillar attempting to discriminate against elderly employees.

20. The Court is mistaken in its factual analysis contained in the first paragraph of page five (5) in that the Court seems to be laboring under the impression that Caterpillar is stating that Caterpillar eliminated James Bennington's position because it wished to eliminate supervisors who are not supportive of the Vision, Values and Teamwork initiatives. Neither Caterpillar nor James Bennington asserts that Caterpillar was eliminating James Bennington's "position" in order to eliminate Bennington, the "employee". James Bennington is well aware that management decisions periodically have created changes in the number and manner of responsibilities which will be placed upon any individual management employee at Caterpillar. Caterpillar's claim, as reflected by Paul Wroblewski, is that James Bennington, as an individual and not James Bennington's position, was eliminated because Paul Wroblewski claimed that James Bennington did not support the Vision, Values and Teamwork initiatives. (See Supp. to 1997 employee review, Bennington Caterpillar employee history folder contents from 1988 through 1998, Exhibit "A" of Plaintiff's Mem. in Opposition to Motion for Summary Judgment) Clearly, the record adequately reflects evidence to the fact that James Bennington did support the Vision, Values and Teamwork initiatives, thus, for purposes of this motion, the Court must

assume that James Bennington, in fact, did support the Vision, Values and Teamwork initiatives and, further, that he was not relieved of responsibility and placed in waste management because of any failure to be supportive of the Vision, Values and Teamwork initiatives. (See Supp. to 1997 employee review, Bennington Caterpillar employee history folder contents from 1988 through 1998, Exhibit "A" of Plaintiff's Mem. in Opposition to Motion for Summary Judgment, Holloman Decl. and page 193 - 194 of Bennington Dep.) Clearly, based upon all of the evidence before this Court contained in the various affidavits, statements and transcripts, this Court must find that James Bennington did support the Crosby Vision, Values and Teamwork initiatives or, at the very least, must find that this issue is contested and, as such, must be interpreted in favor of James Bennington for purposes of this motion.

21. The bottom two paragraphs on page five (5) are basically factually correct, however, this statement of facts fails to include the facts that James Bennington and the other employees who were placed in waste management were extremely fearful and uncertain as to the effect that these changes would have upon their security with Caterpillar. James Bennington and the other employee's transferred to this waste management area were extremely fearful of losing their employee salary protections and extremely fearful of losing their working careers of accrued retirement benefits. (See pages 118 - 121 of Bennington Dep.) They were also publicly humiliated and shunned by other employees and their negative annual performance review for 1997 prevented any opportunity for transfer to another meaningful assignment at Caterpillar. (See ¶ 42 - 44 of Holloman Decl., ¶ 6 - 7 of Bennington Decl., page 32 - 33 and 39 of Kamp Dep. and page 118 - 121 of Bennington Dep.) The statement at the bottom of the middle paragraph on page five (5) that James Bennington remained at the same grade level is correct, however, James Bennington did lose benefits in that he lost his office, he lost his entire work force and subordinate

employees, he lost all supervisory responsibilities, he lost all work load, and he lost all job assignments. Thus, while James Bennington may have not lost payroll benefits, he did lose many other benefits of his employment.

II

MOTION TO RE-OPEN DISCOVERY

1. This Honorable Court erred in failing to allow James Bennington to reopen discovery once it was discovered that there was a conflict in the testimony of two deponents. James Bennington has shown that this conflict is extremely relevant to his case. The Court makes a mistake in its statement in the last paragraph on page seven (7) when it states that it is a common practice for higher ups to review and alter performance evaluations. While it is common for higher ups to review performance evaluations written by an employee's immediate supervisor, it is not a common practice and it is not a proper practice to alter a performance evaluation after it has been through the sign line and placed in an employee's personnel history folder. James Bennington has proven that Caterpillar engaged in the improper unusual practice of changing the performance reviews of both John Kamp and James Bennington after they had been through the sign line. (1997 employee review, Bennington Caterpillar employee history folder contents from 1988 through 1998, Exhibit "A" of Plaintiff's Mem. in Opposition to Motion for Summary Judgment and pages 23 - 29 of Evans Dep.) It was also not a common practice to alter a performance evaluation without discussion with the supervisory who authorized the performance review. Both John Kamp's and James Bennington's performance reviews were altered after they had been through the sign line and without any discussion whatsoever with the immediate supervisor. (See 1997 employment review, Bennington Caterpillar employee history folder contents from 1988 through 1998, Exhibit "A" of

Plaintiff's Mem. in Opposition to Motion for Summary Judgment and pages 23 - 29 of Evans Dep.) Additionally, Caterpillar was willing to again change John Kamp's performance evaluation back to a favorable evaluation and pay him discretionary bonus money for being a favorable employee who met product engine performance division goals. (See pages 35 - 36 of Kamp Dep.)

2. If Caterpillar was not attempting to improperly coerce elderly employees into retirement, then why did Caterpillar depart from their normal policies and improperly change performance reviews and then be willing to change these performance reviews back to favorable reviews and pay additional money in order to secure the retirement of the employee? Clearly, the altering of performance evaluations and the conflict in testimony and possible perjury by Caterpillar employee, Don Evans, justifies further discovery to determine what other actions were taken against other elderly employees who were placed in waste management. (See page 120 of Bennington Dep. and pages 46 - 47 of Evans Dep.)

3. If, as Plaintiff suspects, other employee's performance evaluations were also improperly altered in order to secure their forced retirement, then this is clearly evidence which is necessary for Plaintiff to discover and clearly will be relevant to Plaintiff's case. It would be a mistake for this Court to make the conclusion that the improper altering of performance evaluations in order to coerce retirement of elderly employees is not relevant to this case. It is clear that James Bennington's contentions are that Caterpillar embarked upon a scheme to get rid of elderly management employees. Don Evans admits in his deposition (pages 23 - 29) that an attempt was being made to remove management employees in order to lower operating costs. It is clear that Plaintiff's theory in this case is that Caterpillar embarked upon an improper course of conduct against elderly employees to secure the retirement of elderly employees by altering their performance evaluations in a manner that would

take away their employee protections and by publicly humiliating them by transferring them to an empty work area with no job responsibility and no employees. Clearly, Plaintiff must be allowed to explore through discovery whether the improper actions taken to James Bennington and John Kamp were also taken the other elderly employees who were placed in waste management. If James Bennington is to be allowed to develop substantiation for his claim that Caterpillar was committing age discrimination. The fact that Plaintiff has discovered proof of improper manipulation of employee personnel records justifies re-opening of discovery to search for other similar acts by Caterpillar against employees in the same protected class.

III

AGE DISCRIMINATION CLAIMS

1. The Court is correct when it states that the standard for review of a motion of this type is that the Court must view the record and all references drawn from it in the light most favorable to the non-moving party, in this case, James Bennington. If a jury could return a verdict for the non-moving party, then the Motion for Summary Judgment is to be denied. Clearly, in the within case, a jury could return a verdict for James Bennington based upon the evidence presently before this Court.

2. The Court has stated the four elements necessary to prove a *prima facie* case in the last paragraph of page ten (10) of its decision. The Court has ruled correctly that it is not contested that Plaintiff is a member of a protected class. It is unclear as to the Court's position regarding the second element of the test regarding whether Plaintiff was performing his job satisfactorily. Clearly, for the reasons given earlier in this motion, a reasonable jurist could easily find that James Bennington performed his job satisfactorily. Both his initial 1997 annual performance review and the testimony of his immediate supervisor are clearly enough evidence to establish this element

of a *prima facie* case. The Court also ruled correctly on the third element necessary for a *prima facie* case in finding that a reasonable jurist could find that James Bennington was subject to a material adverse employment action. However, the Court erred in its statement that James Bennington failed to meet the fourth test for a *prima facie* case. The test of whether substantially younger employees were treated more favorably. The employees who were placed in waste management, including James Bennington, were aged as follows: James Bennington, D.O.B. 8/7/44; John Kamp, D.O.B. 1/18/41; Jerry Siwicke, D.O.B. 1943. Mark Dubois was of the same general management level as Plaintiff but was treated more favorably and Mark Dubois was over ten (10) years younger than Bennington, Kamp and Siwicke along with other younger employees. (See ¶ 13 of Bennington Decl.) Clearly, elderly management employees were a target of Caterpillar for forced retirement or discharge as evidenced by the improper actions taken against them.

3. This Court's rulings in regard to closing off discovery before James Bennington has had a reasonable opportunity to conduct appropriate discovery in this case has further limited James Bennington's opportunities to give this Court further evidence of the age discrepancies between the employees who are treated favorably and the employees who were placed in waste management. Further discovery, if allowed by this Court, will surely substantiate and provide further proof of the substantial age difference between the employees who were treated unfavorably by being placed in waste management and placed in fear of loss of their employment and retirement benefits and those who were retained in management positions. It is a mistake to only consider the age of Perry Lubbers and the age of James Bennington when attempting to discern whether Caterpillar engaged in a course of conduct to rid itself of more costly elderly senior employees in favor of cheaper, less senior, younger employees. In other words, it is necessary to look at the big picture in order to determine Caterpillar's discriminatory

intent. The mere fact that they retained a man who is five years younger than James Bennington does not prove that Caterpillar had no discriminatory intent against elderly employees. It only proves that Perry Lubbers was not above Caterpillars arbitrary cutoff point. It would make more sense to compare James Bennington with Mark Dubois who is more than ten (10) years younger than James Bennington, and was also employed as a unit manager (the same position as James Bennington) in the same factory building as James Bennington and reporting to the same supervisor as James Bennington. In other words, this Court committed error in finding that James Bennington was only five years older than an employee in a comparable position who was treated differently and more favorably. In fact, James Bennington was treated differently than at least two employees, one of which was five (5) years younger and the other was ten (10) years younger than James Bennington. Hence, clearly even without additional discovery, James Bennington has provided at least the minimum necessary to establish a *prima facie* case.

4. Caterpillar may attempt to argue that the position of Mark Dubois and that of James Bennington are not comparable, because of the fact that Mark Dubois was a unit manager in the machine shop and James Bennington was a unit manager in the assembly area. However, this argument does not prevail because of the fact that both positions were considered equal in responsibility at Caterpillar and because James Bennington was a unit manager in the machine shop and had been for many years. Mark Dubois had only been a unit manager in the machine shop for less than one year. (See ¶ 13 of Bennington Decl.)

IV

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIM

1. This Court committed error in finding that James Bennington failed to meet his burden in proving a *prima facie* case of intentional infliction of emotional distress. Clearly, James Bennington has established that he has suffered severe emotional distress in that James Bennington believed his treatment by Caterpillar to him put him in a POW camp and these actions "working" on his "mind" and "you get paranoid". (See pages 118 - 120 of Bennington Dep. and 116 of Bennington Decl.) Bennington speaks of employees in waste management being "scared to death". These statements are supported by those of John Kamp. (See pages 32 - 33 of Kamp Dep.)

2. This Court erred in finding that the record contains no indication that James Bennington has suffered legally cognizable emotional distress.

3. It is true that James Bennington spent most of his argument in the original Motion for Summary Judgment dealing with Caterpillar's claim that Caterpillar did not commit conduct that was truly extreme and outrageous.

4. It is clear that the members of waste management who were subjected to the discriminatory action by Caterpillar were placed under severe emotional distress, including James Bennington.

5. As such, it is clear that this court should not have granted summary judgment to Defendant on James Bennington's claims that Caterpillar violated the age discrimination and employment act by transferring him to waste management (Count I) by constructively discharging him (Count II) and by creating a hostile work environment (Count III).

WHEREFORE, Plaintiff, JAMES BENNINGTON, by his attorney, WILLIAM M. ANDERSON IV, respectfully prays that this Court reconsider its Order and Judgment of January 12, 2001, and deny Defendant's Motion for Summary Judgment on all counts and grant Plaintiff's Motion to Re-Open Discovery and for such other and further relief as this Court deems appropriate.

Respectfully submitted,

/s/ William M. Anderson IV
WILLIAM M. ANDERSON IV
Attorney for Plaintiff

ANDERSON LAW OFFICES
William M. Anderson IV
625 South Main
Creve Coeur, Illinois 61610
Telephone: (309) 694-6250

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

JAMES BENNINGTON,	)	
	)	
Plaintiff,	)	
	)	
v	)	Case No. 99-1111
	)	
CATERPILLAR, INC.,	)	
	)	
Defendant.	)	

ORDER

Before the Court is Plaintiff's Motion to Reconsider (Doc. #54). The facts of this case are set forth in detail in the Court's Order of January 12, 2001, and need not be repeated here. For the reasons that follow, Plaintiff's motion will be denied.

"Motions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence." Caisse Nationale de Credit v. CBI Industries, 90 F.3d 1264, 1269 (7th Cir. 1996). Furthermore, it is not appropriate to argue matters that could have been raised in prior motions or rehash previously rejected arguments in a motion to reconsider. See Id. at 1270. A Rule 59(e) motion should be granted if there exists "a manifest error of law or fact," so as to enable "the court to correct its own errors and thus avoid unnecessary appellate procedures." Moro v. Shell Oil Co., 91 F.3d 872, 876 (7th Cir. 1996).

Here, Plaintiff asserts thirty-three errors were made by the Court in its January 12, 2001 Order. The first twenty-one alleged factual errors relate to the Court granting summary judgment in favor of Defendant. In its previous Order, the Court granted summary judgment because Bennington had failed to establish a *prima facie* case of age discrimination since he did not show that similarly situated employees who were substantially younger than him were treated more favorably. None of the factual errors alleged in Plaintiff's current motion would change this finding. All of the alleged errors deal with Plaintiff's work history and the circumstances surrounding his transfer, however, none of these facts show that Plaintiff was unlawfully discriminated against. Furthermore, none of the alleged factual errors would correct the defect in Plaintiff's *prima facie* case: that he was replaced by someone that was not significantly younger than himself.

The next errors alleged by Plaintiff relate to his Motion to Re-open Discovery. The court found that Plaintiff would not be prejudice if he were not allowed to take additional depositions in this case. In its present motion, Plaintiff argues that these additional depositions would allow him to prove that Caterpillar's supervisors improperly altered employee performance evaluations to coerce elderly employees into retirement. First of all, the Court has already found that it was common practice for Caterpillar supervisors to alter performance evaluations. Still, Plaintiff has presented no evidence to suggest Caterpillar's motivation in changing performance evaluations was age related. Furthermore, the Court does not see how further depositions would result in such evidence. Moreover, the fact that Bennington was replaced with an employee that was only five years younger than him, weighs against such a conclusion.

As to this last point, Plaintiff argues that Perry Lubbers was not the only similarly situated employee and urges the Court to now consider another employee who was treated more favorably than Bennington and who was ten years younger. Furthermore, Plaintiff argues that the re-opening of discovery would allow Bennington to show larger age discrepancies between employees that were treated more ore less favorably. First of all, this argument could have been presented in Plaintiff's summary judgment response, but was not. Therefore, the Court should not consider it here. Next, Plaintiff's original motion related to the depositions of two individuals regarding the alteration of performance evaluations. Now, Plaintiff seems to argue that unlimited discovery is warranted. Even if this request had merit, and the Court does not think it does, this request is certainly not appropriate at this time. Therefore, the Courts finds that Plaintiff has not been prejudiced by the Court's order denying his request to re-open discovery.

Finally, Plaintiff alleges that the Court erred in granting summary judgment as to his emotional distress claim, however, Plaintiff does not point to any factual or legal errors in support of this conclusion. Therefore, the Court's ruling will stand as to this claim.

CONCLUSION

IT IS THEREFORE ORDERED that Plaintiff's Motion to Reconsider (Doc #54) is DENIED.

ENTERED this 31st day of January, 2001.

/s/ Joe B. McDade
JOE BILLY MCDADE
Chief United States District Judge

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
PEORIA DIVISION

JAMES BENNINGTON,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 99-1111
	)	
CATERPILLAR, INC.,	)	Judge Joe B. McDade
	)	
Defendant.	)	

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The Plaintiff, JAMES BENNINGTON (hereinafter "Bennington"), by and through his attorney, submits this memorandum in opposition to the motion for summary judgment of the Defendant CATERPILLAR, INC. (hereinafter "Caterpillar").

INTRODUCTION

Bennington has filed an Amended Complaint (hereinafter "Am. Compl.") which alleges that Caterpillar violated the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634 in various respects. Specifically, Bennington has alleged that Caterpillar violated the ADEA by transferring him, constructively discharging him, and subjecting him to a hostile work environment. (*See* Am. Compl., Counts I, II, III, respectively.) Furthermore, Bennington alleged that Caterpillar's conduct intentionally inflicted emotional distress in violation of Illinois common law. (*See id.*) In its Motion for Summary Judgment and Memorandum in Support ["Def.'s Mem."], Caterpillar argues that it is entitled to summary judgment on all of the above claims. Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c); *Rickgauer v. Martin Marietta Materials, Inc.*, 55 F. Supp. 2d 899, 903 (C.D. Ill. 1999). "A genuine issue of material fact exists when 'there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.'" *Rickgauer*, 55 F. Supp. 2d at 903 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). Moreover, the party moving for summary judgment has the burden of demonstrating the absence of a genuine issue of material fact. *Rickgauer*, 55 F. Supp. 2d at 903. In making that determination, however, the court must view all evidence in the light most favorable to the party opposing the motion. *Id.* Additionally, since employment discrimination cases such as this one often hinge on questions of intent and credibility, the court must apply the summary judgment standard with "added vigor." *Pitasi v. Gartner Group, Inc.*, 184 F.3d 709, 714 (7th Cir. 1999); *Campbell v. Fasco Indus., Inc.*, 861 F. Supp. 1385, 1390 (N.D. Ill. 1994) (i.e., favoring plaintiff's view of the facts), *aff'd*, 67 F.3d 301 (7th Cir. 1995), *cert. denied sub nom. Cole v. City of Milwaukee, Wisconsin*, 516 U.S. 1078 (1996). Plaintiff asserts that, in light of the United States Supreme Court's statements in *Reeves v. Sanderson Plumbing Products*, 120 S.Ct. 2097 (2000) at page 2105, that the *McDonnell Douglas* burden shifting frame work should not apply to ADEA claims. This burden shifting frame work should not be applied herein, however, the remainder of this memorandum shall assume, arguendo, that said frame work applies to the ADEA. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). In light of the foregoing, it is clear that Caterpillar is not entitled to summary judgment in this case.

ARGUMENT[3]

I. CATERPILLAR IS NOT ENTITLED TO SUMMARY JUDGMENT ON BENNINGTON'S TRANSFER CLAIM.

A. Bennington Suffered Adverse Employment Action Within The Meaning Of The ADEA.

In *Fortier v. Ameritech Mobile Communications, Inc.*, 161 F.3d 1106 (7th Cir. 1998), the Seventh Circuit thoroughly summarized what constitutes a "materially adverse employment action":

> Under our precedent, "a materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities." *Crady v. Liberty Nat'l Bank & Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993). "A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, *or other indices that might be unique to a particular situation*." *Id.* "Not everything that makes an employee unhappy is an actionable adverse action." *Smart v. Ball State Univ.*, 89 F.3d 437, 441 (7th Cir. 1996). However, *adverse job actions can include changes that do not involve quantifiable losses in pay or benefits*. For example, in *Collins v.*

---

[3] The ADEA and Title VII are sufficiently similar so that cases involving one are applicable to the other. *See United States EEOC v. Metropolitan Educational Enterprises, Inc.*, 864 F. Supp. 71, 73 (N.D. Ill. 1994), *aff'd*, 60 F.3d 1225 (7th Cir. 1995).

Illinois, 830 F.2d 692, 703-04 (7th Cir. 1987), an adverse job action was found when an employee was moved to a new department where her supervisors did not even know what her job entailed, she lost her office, phone, and business cards, and she was assigned to a receptionist-type desk. Also, in *Dahm v. Flynn*, 60 F.3d 253 (7th Cir. 1994), this court held that "decreasing some job responsibilities while increasing other duties can, under limited circumstances, constitute an adverse employment action" and that "*a dramatic downward shift in skill level required to perform job responsibilities can rise to the level of an adverse employment action.*" *Id.* at 257, 258: Similarly, terminating supervisory authority over other employees could constitute an adverse employment action. *See id.* at 258-59.

Id. at 1111-12 n.7 (emphasis added). Evidently, the Seventh Circuit has broadly defined adverse employment action. *Bibbs v. Board of Trustees of Univ. of Illinois*, 9 F. Supp. 2d 964, 971 (N.D. Ill. 1998), *aff'd*, 191 F.3d 455 (7th Cir. 1999).

It has been clearly established that even employment actions short of outright termination are actionable under the ADEA. *See Fortier* (collecting cases). Consequently, an intra-company transfer may constitute an adverse employment action. *See, e.g., Flaherty v. Gas Research Instit.*, 31 F.3d 451, 456-57 (7th Cir. 1994) ("an employer does not insulate itself from liability for discrimination simply by offering a transfer at the same salary and benefits"); *McCabe v. Sharrett*, 12 F.3d 1558 1564 (11th Cir. 1994) (fewer responsibilities, more menial tasks, and lesser opportunity for advancement constitutes adverse employment action) (cited with approval in *Flaherty*, 31 F.3d at 457); *see also Mohr v. Chicago Sch. Reform Bd. of Trustees*, 99 F. Supp. 2d 934, 938 (N.D. Ill. 2000) ("It is adverse employment action to be reassigned from the status of a regular teacher . . . to that of a substitute who must go sometimes to several schools a day and teach out of her area; or even to be deprived of the responsible position of department chairperson.").

In the instant case, Bennington was transferred from his position as Unit Manager in the Assembly area in Building DD, after more than 30 years of service with Caterpillar, to what was officially termed the "Special Projects Group." (*See generally* Bennington Dep. at 16-80 (chronological and detailed history of Bennington's employment at Caterpillar); Bennington Decl. ¶ 1 (32 years of service); Bennington Dep. Ex. 1 (Unit Manager); Bennington Dep. at 77-84 (Bennington assigned to "Special Projects").) As discussed in more detail below, *infra* at 5-6, Bennington's transfer from Unit Manager to the "Special Projects Group" undoubtedly involved "a dramatic downward shift" in skill level and responsibilities. *See Dahm v. Flynn*, 60 F.3d 253, 258 (7th Cir. 1994) (quoted in *Fortier*, 161 F.3d at 1112 n.7).

Caterpillar, however, suggests at least three reasons why Bennington's transfer does not constitute adverse employment action as a matter of law. Upon closer examination, however, none of its arguments suffice. Initially, Caterpillar relies on the fact that adverse employment action is often associated with some form of "direct economic harm." (*See* Def.'s Mem. at 2.) Financial detriment, however, is not the only indicator of adverse employment action. *See Fortier*, 161 F.3d at 1112 n.7 (and cases cited); *McKenzie v. Illinois Dep't of Transp.*, 92 F.3d 473, 479 (7th Cir. 1996) ("harassment need not be linked to an economic quid pro quo" to be discriminatory). Therefore, the fact that Bennington's salary and benefits were unchanged does not necessarily suggest that he did not suffer adverse employment action.

Secondly, Caterpillar claims to have given Bennington a mere "temporary assignment in the Special Projects Group." (*See* Def.'s Mem. at 3.) First of all, there was no indication that Bennington's alleged reassignment was only "temporary." (*See* Bennington Dep. at 218:10-19.) Furthermore, the alleged "Special Projects Group" was merely the official name for what was commonly referred to as "waste management." (Bennington Dep. at 100-04 (Caterpillar Vice-President Dan Murphy used term "waste management"), 104:21 (same); 106:3 (same).) The term "waste management" was used to describe when Caterpillar employees "moved into a vacated building or empty work area, placed in there and given no assignments." (*See* Bennington Dep. at 108:1-3.) Although the "higher-ups" did not like that term, it was commonly used and understood by Caterpillar employees. (Bennington Dep. at 108:4-7.) Moreover, that was exactly what happened to Bennington. (*See generally* Bennington Dep. at 79-82 (Bennington suddenly told to clear out desk and report to vacant building and given no assignments).) Rather than being assigned "special projects," as the official title implies, or even being assigned any in-house projects, Bennington was told to look for other work himself. (Bennington Dep. at 127:2-17.) Clearly, the title "Special Projects Group" is merely a polite term for what is in reality a dumping ground for unwanted employees.

Lastly, Caterpillar asserts that while in the "Special Projects Group," Bennington was afforded computer and other training to further improve his skills and opportunities for other jobs. (Def.'s Mem. at 3.) As an initial matter, this very argument implicitly concedes that the Special Projects Group was intended to transition current employees out of the company. That fact notwithstanding, Bennington was not "provided" training, but rather took it upon himself to take a Windows self-tutorial merely because he was so bored and tired of doing nothing for eight hours a day. (*See generally* Bennington Dep. at 141-42.) In any case, a mere introduction to Windows did not really qualify him for anything for which he was not already qualified. (*See* Bennington Dep. at 142-43.)

In sum, Bennington has provided ample evidence to support his allegation that his transfer constituted "adverse employment action" within the meaning of the ADEA. At best, Caterpillar has demonstrated that Bennington's claim is based on inference and credibility determinations. Even assuming, *arguendo*, that that is correct, summary judgment is still not appropriate. *See Pitasi*, 184 F.3d at 714.

B. Bennington Has Established Age Discrimination Through The Indirect Method Of Proof.

In order to succeed on his ADEA claim, Bennington must prove that age motivated Caterpillar's transfer decision. *Reeves v. Sanderson Plumbing Prods., Inc.*, 120 S. Ct. 2097, 2105 (2000). One of the accepted ways to establish such intentional discrimination in violation of the ADEA is the indirect method of proof which follows the burden-shifting analysis established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Ransom v. CSC Consulting, Inc.*, 217 F.3d 467, 468 (7th Cir. 2000). Under the McDonnell Douglas burden-shifting analysis used in the indirect method of proof, the plaintiff must first prove, by a preponderance of the evidence, a prima facie case of the alleged discrimination. *Ransom*, 217 F.3d at 470. Once the plaintiff does so, a presumption of discrimination exists, which then shifts the burden to the defendant to present evidence of a legitimate, non-discriminatory reason for the adverse employment decision. *Id.* If and when the defendant does so, the presumption of discrimination disappears, and the burden shifts back to the plaintiff to show the reason(s) proffered by the defendant is (are) merely a pretext for unlawful discrimination. *Id.* Moreover, in the Seventh Circuit, a combination of direct and circumstantial evidence, none of which standing alone would be conclusive, may cumulatively present a "convincing mosaic of discrimination" by which the plaintiff can survive a motion for summary judgment. *Robin v. Espo Eng'g Corp.*, 200 F.3d 1081, 1088-89 (7th Cir. 2000).

1. Bennington Has Established a Prima Facie Case under the ADEA.

In order to prove a prima facie case under the ADEA, Bennington must demonstrate that (1) he was over 40 years old; (2) he was performing his job satisfactorily; (3) he suffered an adverse employment action; and (4) he was treated less favorably than other substantially younger, similarly situated employees. *Ransom*, 217 F.3d at 470. Moreover, in responding to a summary judgment motion, Bennington need only prove his prima facie case by a preponderance of the evidence. *See Campbell v. Fasco Indus., Inc.*, 861 F. Supp. 1385, 1390 & n.5 (N.D. Ill. 1994) (there is a very low threshold to establish prima facie case), *aff'd*, 67 F.3d 301 (7th Cir. 1995), *cert. denied sub nom. Cole v. City of Milwaukee, Wisconsin*, 516 U.S. 1078 (1996). Since Caterpillar only challenges the "substantially younger" portion of Bennington's prima facie case (*see* Def.'s Mem. at 5), the other aspects of his prima facie case are deemed satisfied for purposes of the instant motion. *Pitasi v. Gartner Group*, 184 F.3d 709, 714 (7th Cir. 1999); *Campbell*, 861 F. Supp. at 1390 (same).

As Caterpillar correctly points out, an age gap of 10 years is presumed to be "substantially younger" for ADEA purposes. (*See* Defendant's Mem. at 5 (citing *Hartley v. Wisconsin Bell, Inc.*, 124 F.3d 887, 893 (7th Cir. 1997)).) The *Hartley* court, however, did not foreclose the possibility that a lesser age gap would still satisfy the substantially younger aspect of an ADEA prima facie case: "In cases where the [age] disparity is less, *the plaintiff still may present a triable claim* if she directs the court to evidence that her employer considered her age to be significant. In that instance, the issue of age disparity would be less relevant." 124 F.3d at 893 (emphasis added); *see also id.* ("[T]he line we draw [the ten year age gap] is not so bright as to exclude cases where the gap is smaller but evidence nevertheless reveals the employer's decision to be motivated by the plaintiff's age."). In the instant case, Bennington has presented sufficient additional evidence which suggests that Caterpillar's decision to transfer him was motivated by age.

In May 1997, while Bennington was a Unit Manager, he went to speak with his immediate supervisor, Jerry Holloman, on his own volition. (Bennington Dep. at 69:22-23.) Although the two production lines that were Bennington's responsibility were in "good shape," he wanted to inform Holloman that certain other areas were in terrible condition and very behind schedule. (Bennington Dep. at 70:2-16; Holloman Decl. ¶¶ 16-20.) Upon receiving this information, Holloman as factory manager, checked this out for himself and agreed with Bennington's assessment. (Bennington Dep. at 70:18-23.) Consequently, Holloman immediately assigned Bennington the responsibility of fixing that situation, and relieving him of his former responsibilities. (Bennington Dep. at 71:1-21; Holloman Decl. ¶ 21.) Holloman gave Bennington the additional responsibility not because he caused the predicament, but rather because he knew Bennington was a highly competent manager who could correct the problem. (Bennington Dep. at 71:4-21; Holloman Decl. ¶ 22.)

By the fall of 1997, Bennington had worked extremely hard and extremely long hours attempting to make his new areas "current." (Bennington Dep. at 76:3-6.) At that time, Dan Murphy, a Caterpillar vice-president, inquired when various buildings would be made current. (Bennington Dep. at 76:17-18, 77:1-2.) When he did not receive the answer he wanted to hear, he "got very angry" and threatened that if you are not "current" by the date given, people are going to be fired. (Bennington Dep. at 77:4-6.) Notwithstanding the extreme demands put on him, Bennington made his sections current by Murphy's deadline and remained current for the remainder of the year. (Bennington Dep. at 77:10-11.) When Holloman retired at the end of that year, he wrote Bennington a very favorable final performance review and thanked him for a job well done, stating that "no one else could have done it better." (Bennington Dep. at 77:11-21; Holloman Decl. ¶ 30.)

Upon Holloman's retirement in December 1997, Ray Shearer replaced Holloman as Bennington's immediate supervisor. (Bennington Dep. at 77:12-13, 78:3-4.) Very soon after Holloman wrote the favorable review, Bennington was called into Shearer's office and shown Paul Wroblewski's changes to Holloman's review, which turned "the good review to a completely unacceptable performance-type review." (Bennington Dep. at 78:2-8.)

This was extremely unusual given that Holloman wrote the initial performance review because he was Bennington's immediate supervisor for close to three years and thus knew Bennington and his job performance better than Wroblewski did. (*See* Holloman Decl. ¶¶ 4-9; Bennington Dep. at 94-95 (Wroblewski rarely even at staff meetings).) Furthermore, if Wroblewski disagreed with Holloman's evaluation of Bennington, the "normal practice" would have been to inform Holloman before initiating any changes to the report. (*See* Holloman Decl. ¶¶ 32-33.) In this case, however, Wroblewski altered Holloman's review of Bennington without informing Holloman at all. (*See* Holloman Decl. ¶¶ 35-39.) Moreover, Holloman believes that Wroblewski's changes to Bennington's review are wholly unwarranted. (*See* Holloman Decl. ¶ 40.) Also of note is that Wroblewski's negative comments were the only negative review Bennington had received in his 30-plus years at Caterpillar. (*See* Bennington Dep. at 158:9-12, 159:3-14, 195:1-12; Bennington Decl. ¶ 1.)

Nevertheless, after being given a direct order to sign the altered review, Bennington spoke with Shearer about his job performance and now negative review. (Bennington Dep. at 78:9-15, 176:9-12.) After Shearer stated that he was wholly satisfied with Bennington's performance, Bennington made it clear that he was very committed to his job and that he could do it better than anyone else. (Bennington Dep. at 79:5-7.) In response, Shearer again stated that he was pleased with Bennington's work and that he had nothing "to be concerned about," adding that Shearer made any termination decisions for workers in his group. (Bennington Dep. at 79:8-13.)

Approximately three working days later, Bennington was told to report to Wroblewski's office. (Bennington Dep. at 79:15-18.) Dutifully, Bennington reported to Wroblewski's office and was bluntly told to "go clean out your desk, do it quickly, and be quiet about it." (Bennington Dep. at 79:19-21.) No explanation was given, other than to report back to Shearer about where to go next and that Bennington was "a high maintenance manager." (Bennington Dep. at 79:21-80:4.) When Bennington asked Shearer what was going on, Shearer was speechless. (Bennington Dep. at 80:5-12.) The only thing Shearer was able to say was for Bennington to report to Building B, a completely vacant and empty shop. (Bennington Dep. at 80:17-20.) This area, however, was the depot for the Special Projects Group, otherwise known as waste management. *See* Part I.A., *supra.*

At the very least, Bennington has demonstrated that a genuine issue of material fact exists with regard to whether he suffered an adverse employment action, and thus Caterpillar's motion for summary judgment on this claim must be denied. *See Pitasi*, 184 F.3d at 714.

2. Bennington Has Demonstrated That Caterpillar's Proffered Reason for His Transfer Is Merely a Pretext.

Under the burden-shifting analysis, once the plaintiff demonstrates that the adverse employment action was, at least in part, motivated by unlawful discrimination, the defendant may still avoid liability by showing that it would have made the same decision in the absence of the unlawful motivation. *Miller v. Champaign Community Unit Sch. Dist., No. 4*, 983 F. Supp. 1201, 1208 (C.D. Ill. 1997). In the instant case, Caterpillar suggests that Paul Wroblewski, Caterpillar's primary decision maker for purposes of this case, honestly believed that Bennington was not supportive of its teamwork initiative, specifically pointing to Bennington's allegedly "poor attitude and job performance." (*See* Def.'s Mem. at 6.) However, Bennington has presented sufficient evidence to indicate that Caterpillar's proffered non-discriminatory reason for transferring him is merely a pretext for unlawful discrimination.

In this context, "[p]retext means a lie, specifically a phony reason for some action." *James v. Sheahan*, 137 F.3d 1003, 1007 (7th Cir. 1998) (citation omitted; internal quotations omitted). A plaintiff may establish pretext by demonstrating any one of the following: (1) the explanation had no basis in fact; (2) the explanation was not the real reason; or (3) the reason stated was insufficient to warrant the adverse job action. *Id.* at 1007; *Zamudio v. Patla*, 956 F. Supp. 803, 813 (N.D. Ill. 1997). Moreover, the plaintiff need only prove pretext by a preponderance of the evidence. *See id.* at 813; *Perdomo v. Browner*, 67 F.3d 140, 145 (7th Cir. 1995) (regarding summary judgment on pretext issue, question is whether plaintiff produced enough evidence from which a rational factfinder could infer that defendant lied in proffering non-discriminatory reason for adverse employment action). The same facts which support Bennington's argument regarding other evidence of discrimination also support the present argument regarding pretext. *See* Part I.B.1., *supra*. It is Caterpillar's contention that Bennington was transferred essentially because he avoids taking responsibility, blames others for his failures, and did not produce sufficient results. (*See* Def.'s Mem. at 6; Bennington Dep. Ex. 1.) The above-referenced facts, however, clearly demonstrate that Caterpillar's purported reasons for transferring Bennington are merely lies. In sum, not only did Bennington successfully manage his own workers, but he successfully coordinated with other departments when his responsibilities were increased, and still met the deadlines imposed. (*See generally* Bennington Dep. at 70-71, 77; Holloman Decl. ¶ 16 (Bennington did excellent work), ¶¶ 21-30 (Bennington played key role in difficult job of making problem area current), ¶ 47 (Bennington was "best [manager] I had ever seen").) *See also Brown v. City of Aurora*, 942 F. Supp. 375, 381 (N.D. Ill. 1996) ("The Court does not believe that there can be a bright-line rule as to whether discriminatory remarks, by themselves, are sufficient to raise a reasonable inference that the employer's legitimate, nondiscriminatory reason is pretextual. Rather, each case must be analyzed on its own facts. The inquiry should focus on the type and frequency of the remark, the context in which the remark was stated, the period of time between the remark and the adverse employment action, whether the remark was uttered by the decision maker, and any other relevant factors.") (in that case, the plaintiff survived summary judgment on the pretext issue). At the very least, Bennington has demonstrated that a genuine issue of material fact exists regarding Caterpillar's allegedly non-discriminatory reason for transferring him, and thus Caterpillar's motion for summary judgment on this claim must be denied. *See Pitasi*, 184 F.3d at 714.

II. CATERPILLAR IS NOT ENTITLED TO SUMMARY JUDGMENT ON BENNINGTON'S CONSTRUCTIVE DISCHARGE CLAIM.[4]

The Seventh Circuit recently stated that "[t]he term 'constructive discharge' refers to the situation in which an employee is not fired but quits, but in circumstances in which working conditions have made remaining with [his] employer simply intolerable." *Lindale v. Tokheim Corp.*, 145 F.3d 953, 955 (7th Cir. 1998). Similarly, the court has defined "constructive discharge" to exist where "an employee's discriminatory working conditions become so intolerable that a reasonable person in her position would be compelled to resign." *Perry v. Harris Chernin, Inc.*, 126 F.3d 1010, 1015 (7th Cir. 1997). "[T]he test for intolerable working conditions is whether a *reasonable* employee would have concluded that the conditions made remaining in the job unbearable." *Lindale*, 145 F.3d at 955 (emphasis in original). Based on the facts of this case, Bennington has established facts sufficient to enable his constructive discharge claim to survive summary judgment.

---

[4] Even if the Court finds that Bennington suffered no adverse employment action, that does not necessarily suggest that Bennington was not constructively discharged. *See Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (11th Cir. 1996) ("The action that precipitates a constructive discharge . . . need not itself be a materially adverse employment action of any kind.").

Contrary to Caterpillar's assertions, it did not make any efforts to make the "Special Projects" work environment more tolerable. (*See* Def.'s Mem. at 9.) Rather, Caterpillar's actions unequivocally suggest that it intended to make the "Special Project" employees' circumstances as intolerable as possible. As previously indicated, the Special Projects Group was a farce; it was merely the official name for what was commonly referred to as waste management. *See* Part I.A., *supra* (discussing "waste management"). That term was commonly used to describe when Caterpillar employees "moved into a vacated building or empty work area, placed in there and given no assignments." *See* Bennington Dep. at 108:1-3. [5]Thus, rather than being assigned special projects, as the official title implies, or even being assigned *any* company projects, members of that group were told to look for other work. (Bennington Dep. at 127:2-17; *see also* Holloman Decl. ¶¶ 42-44 (the negative alterations to Bennington's review made it virtually impossible to get other work within Caterpillar).) Clearly, the title Special Projects Group is merely a polite term for what is in reality a dumping ground for unwanted employees. Whatever title one puts on this group of Caterpillar employees, the fact remains that Bennington was a part of that group. (Bennington Dep. at 90:17, 90:19.) Consequently, the logical inference from Caterpillar's actions is that it intended these employees to get out of the company. [6]Accordingly, the above described facts provide strong circumstantial evidence that Bennington *was* discriminated against.

---

[5] Although Bennington was qualified for several other, more productive positions within Caterpillar, he was placed in the totally unproductive waste management department. (*See* Bennington Dep. at 92.)

---

[6] Even if Caterpillar is correct in stating that two other "waste management" employees did not leave Caterpillar and are still employed by Caterpillar (*see* Def.'s Mem. at 9-10), that does not necessarily negate the inference that Caterpillar's intent was to indirectly force at least some waste management employees into retirement. Caterpillar may have put several employees in waste management, hoping that at least a few of them would "leave," and when they did, Caterpillar would put the remaining employees back to work. (*See* Bennington Dep. at 153:1-16.)

Additionally, Caterpillar suggests Bennington was "unreasonably sensitive to his working environment" in that several weeks after being transferred to the "Special Projects Group," Bennington allegedly voluntarily retired. (*See* Def.'s Mem. at 10.) Bennington only very reluctantly decided to retire, given his bleak outlook at Caterpillar. (*See* Holloman Decl. ¶¶ 42-44.) At that point, Bennington had basically been relegated to spend his "working" days at Caterpillar in a vacant room with nothing to do, having been told to look for another job. (Bennington Dep. at 108:1-3, 127:2-17, 141-42; *see also* Bennington Dep. at 119:7-10 (analogizing waste management to P.O.W. camp), 128:10-13 ("I was placed in a position [waste management] where no normal person could withstand that and they would eventually leave the company.").) Given these dire circumstances, and after considering his financial responsibility to his family, Bennington opted for retirement, rather than run the risk of being fired. (Bennington Dep. at 154-155; Bennington Decl. ¶¶ 2-4 (negative reviews would likely deprive Bennington of the protections of Caterpillar's Salaried Employment Security Program).) *Cf. Christensen v. Equitable Life Assur. Society of United States*, 767 F.2d 340, 343 (7th Cir. 1985) (where employer gave plaintiff choice between transfer and termination it constituted constructive discharge), *cert. denied*, 474 U.S. 1102 (1986). In light of these facts, Bennington's decision to "retire," rather than remain in waste management at Caterpillar, was certainly reasonable. *See Zorn v. Helene Curtis, Inc.*, 903 F. Supp. 1226, 1249 (N.D. Ill. 1995) (constructive discharge claim is not automatically defeated by fact that plaintiff endured environment for some time; plaintiff may either quit "cold turkey" or endure lengthy period of turmoil) (citing *Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 677 (7th Cir. 1993)).

Bennington at least has demonstrated that a genuine issue of material fact exists on his constructive discharge claim, and thus Caterpillar's motion for summary judgment on this claim must be denied. *See Pitasi*, 184 F.3d at 714.[7]

III. CATERPILLAR IS NOT ENTITLED TO SUMMARY JUDGMENT ON BENNINGTON'S HOSTILE ENVIRONMENT CLAIM.

A hostile environment claim is based upon conduct which "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment." *Venters v. City of Delphi*, 123 F.3d 956, 975 (7th Cir. 1997) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986)). The hostile environment analysis is based on the totality of the circumstances. *Venters*, 123 F.3d at 975 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993)); *Zorn*, 903 F. Supp. at 1240 & n.13 (no single factor is required in determining whether environment is hostile; isolated instances must be evaluated cumulatively to realistically view work environment) (citing *Doe v. R.R. Donnelley & Sons Co.*, 42 F.3d 439, 443 n.3 (7th Cir. 1994)). Whether a hostile environment existed must be judged from both an objective and subjective point of view. *Venters*, 123 F.3d at 975-76. Under the subjective view, the court must look at the facts as the plaintiff, whereas the objective view calls for the court to examine the facts as a reasonable person. *Id.* at 976. By his filing of the instant lawsuit, it is evident that Bennington views Caterpillar's conduct as creating a hostile environment. Therefore, the critical aspect of this analysis must focus on whether a reasonable employee would view Caterpillar's conduct as such.

---

[7] Caterpillar has argued that Bennington's constructive discharge claim should fail because the Seventh Circuit has "held that working conditions even more unpleasant and embarrassing than the conditions alleged by Bennington were not sufficient to establish constructive discharge." (*See* Def.'s Mem. at 10 (citing cases).) Given the extreme facts of this case, however, there is at least a genuine issue of material fact as to whether Bennington's work conditions were less "unpleasant and embarrassing" than those in other cases. *See Pitasi*, 184 F.3d at 714.

Under the objective view, the court should consider factors such as "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Wilson v. Chrysler Corp.*, 172 F.3d 500, 510 (7th Cir. 1999) (quoting *Harris*, 510 U.S. at 23). Moreover, "[t]he criterion is not what a reasonable employee is capable of enduring but whether the offensive acts alter the conditions of employment." *Wilson*, 172 F.3d at 510. Based on the facts of this case, Bennington has established facts sufficient to enable his hostile environment claim to survive summary judgment. In fact, Bennington has satisfied all of the above suggested objective criteria in the hostile environment analysis.

One of the factors to consider is the frequency of the discriminatory conduct. In this case, not only was Caterpillar's discriminatory conduct frequent, but it was virtually constant. The basis for Bennington's claims involve his transfer to waste management and the totally unreasonable conditions therein. Once Caterpillar transferred Bennington to waste management, he remained there until he left the company. Therefore, the hostile environment Bennington was made to suffer was on a continual basis; five days a week, eight hours per day. (*See* Bennington Dep. at 142:13-14 ("An eight-hour day sitting there with nothing to do").) Another factor to consider is the severity of the hostile environment and the humiliation involved. In this case, Bennington was directed to sit in an empty warehouse all day with nothing to do. (Bennington Dep. at 142:13-14.)

Moreover, being associated with waste management was extremely embarrassing and humiliating. (Bennington Dep. at 107:19-108:12, 155:7-10 ("[T]he humiliation that someone puts up with to sit there and be put on public display, probably so they can get others to sacrifice their jobs and retire or quit."), 206:21-207:4 ("I was put down in that shop . . . where people could walk by and view you from the windows outside. I felt very humiliated. I felt threatened. I felt any minute someone could walk in and say clean out those drawers and get out of here, you're no longer employed with Caterpillar.").) The final suggested factor to consider is whether the employer unreasonably interfered with the employee's job performance. Here, Caterpillar completely and unreasonably interfered with Bennington's job performance by placing Bennington in waste management. As stated above, Bennington was given no work and no responsibilities. Consequently, Caterpillar either interfered with Bennington's job performance, or, alternatively, failed to give him any responsibilities to interfere with at all. (*See* Holloman Decl. ¶¶ 42-44.)

Moreover, the above-described discrimination was age-based. Dan Murphy, a Caterpillar vice-president, stated on at least one occasion, that he was creating a "Waste Management" Department. (*See* Am. Compl. ¶ 18; Bennington Dep. at 100-04.) As previously indicated, that term was commonly known by Caterpillar employees to mean a dumping ground for unwanted employees. (Bennington Dep. at 107-08.) As all of the employees placed in waste management with Bennington were over 40 years of age, and employees younger than the displaced employees filled in their old positions, an inference arises that age was a motivating factor for Murphy's decision to place Bennington in waste management. (*See* Bennington Dep. at 81:4 (Jerry Siwicke and John Kamp were also put in waste management); Kamp Dep. at 28:8 (Kamp was 57 years old at time); Bennington Dep. at 84-85 (Jerry Lubbers replaced him); Def.'s Mem. at 5 (Lubbers is 6 years Bennington's junior).)

Bennington has demonstrated a genuine issue of material fact exists on his hostile environment claim, and thus Caterpillar's motion for summary judgment on this claim must be denied. *See Pitasi*, 184 F.3d at 714.

IV. CATERPILLAR IS NOT ENTITLED TO SUMMARY JUDGMENT ON BENNINGTON'S INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIM.

A. Bennington's IIED Claim Is Not Preempted by the Illinois Workers' Compensation Act.

Caterpillar correctly asserts that the Illinois Workers' Compensation Act (IWCA), 820 ILCS 305/1 et seq. (West 1993 & Supp. 2000), generally preempts common law torts against one's employer. (*See* Def.'s Memo. at 13.) Additionally, Caterpillar correctly identifies one of the exceptions to the above rule: when the injury was not "accidental." (Def.'s Mem. at 13 (citing *Meerbrey v. Marshall Field & Co.*, 139 Ill. 2d 455, 463, 564 N.E.2d 1222, 1225-26 (1990)).) Additionally, Caterpillar points out that intentional torts committed by one employee against another are generally considered "accidental" within the meaning of the IWCA. (Def.'s Mem. at 13.) Caterpillar identifies two exceptions to that rule: "(1) where the employer specifically commands or expressly authorizes the employee to commit the intentional tort; or (2) where the employee acts as the alter ego of the employer." (Def.'s Mem. at 13.) Caterpillar is wrong, however, in its conclusion that the case at bar does not fall within the non-accidental exception to IWCA preemption.

In *Ruich v. Ruff, Weidenaar & Reidy, Ltd.*, 837 F. Supp. 881, 884-85 (N.D. Ill. 1993), the court rejected the defendant's claim of IWCA preemption with regard to the plaintiff's IIED claim. In that case, the defendant was a law firm in which a partner was the offending employee. *Id.* at 884-85. As such, the offending employee was not only the plaintiff's supervisor, but also her employer. *Id.* at 885. Thus, as a partner in the law firm, the offending employee was the employer's alter ego for IWCA purposes, and his intent was imputed to the defendant. *Id.* (citing *Crissman v. Healthco*, 1992 WL 223820 (N.D. Ill. Sept. 1, 1992) (supervisor with high degree of decision making authority may be alter ego under IWCA). Therefore, the plaintiff's injuries were not accidental under the IWCA, and her injuries were not preempted thereby. *Id.*; *see also Briggs v. North Shore Sanitary Dist.*, 914 F. Supp. 245, 252 n.7 (N.D. Ill. 1996) (IWCA did not preclude plaintiff's IIED claim since she alleged that her immediate supervisors acted intentionally).

Similarly, in the instant case, Bennington was at least constructively discharged by Caterpillar's alter ego. The relevant Caterpillar hierarchy was as follows: Bennington reported directly to Jerry Holloman, Holloman reported directly to Paul Wroblewski, Wroblewski reported directly to Dan Murphy. (Bennington Dep. at 62:6-13.) Holloman was Bennington's immediate supervisor for a substantial period of time, and thus knew Bennington and his work performance well enough to make a knowledgeable report on his work performance. (*See* Holloman Decl. ¶¶ 4-9. (Holloman was Bennington's immediate supervisor for approximately two years and eight months).) Holloman accordingly wrote Bennington a favorable 1997 annual review. (Bennington Dep. at 77:12-21; Holloman Decl. ¶ 30.) However, Wroblewski altered that performance review and changed a positive evaluation into a negative one. (Bennington Dep. at 78:2-8.) Moreover, this was done without any consultation with Bennington or Holloman, which was the norm. (Bennington Dep. at 173-74; Holloman Decl. ¶¶ 32-33.) Hence, in by-passing the normal performance review procedures, an upper management employee took it upon himself to determine that Bennington deserved a less laudatory review. In so doing, Wroblewski acted as Caterpillar's alter ego for purposes of Bennington's IIED claim. Additionally, Bennington brought

Wroblewski's improper actions to the attention of A.J. Rassi, Vice President in charge of Human Resources at Caterpillar who told Bennington he could do nothing because Dan Murphy (Wroblewski's supervisor) was his equal as a Vice President. (Bennington dep. pages 83 - 84; Bennington decl. ¶ 10.) This clearly indicates that Wroblewski's actions were sanctioned up through the Vice President level and were thus company policy and not merely the actions of a rogue employee. Further evidence of upper management sanctioning these improper actions are provided by the fact that Don Evans, a supervisor who was also under Dan Murphy's chain of command, performed extremely similar improper actions upon employee John Kamp, by placing John Kamp in waste management/special projects group with Jim Bennington and even going back and changing John Kamp's 1997 annual performance review from a positive evaluation to a negative evaluation after that performance review had been finalized, signed off and placed in John Kamp's personnel folder. This action by Don Evans was also sanctioned by Norm Ricca, Mossville Human Resources manager who reports to A.J. Rassi, Vice President in charge of Human Resources. (John Kamp dep. at ?; Don Evans dep. at ?.) Thus, it is clear that two managers working under Vice President Dan Murphy, to wit, Don Evans and Paul Wroblewski, each changed 1997 annual performance reviews of elderly employees under their supervision in order to improperly justify their transfer to Dan Murphy's waste management/special projects group, with the approval of the Human Resources department. (Don Evans dep. generally; John Kamp dep. generally; Bennington dep. at ?; Holloman decl. at ?; Wroblewski decl. at paragraph 7 - 8 and 16 - 17.) Bennington has demonstrated that there is a genuine issue of material fact precluding summary judgment on Bennington's IIED claim by virtue of preemption under the IWCA.

B. Bennington's IIED Claim Is Not Preempted By The Illinois Human Rights Act.

As indicated by Caterpillar, the Illinois Human Rights Act (IHRA), 775 ILCS 5/1-101 et seq. (West 1993 & Supp. 2000), generally preempts tort claims premised upon a legal duty created by the IHRA. *See* 775 ILCS 5/8-111(C) ("Except as otherwise provided by law, no court of this state shall have jurisdiction on the subject of an alleged civil rights violation other than set forth in [the IHRA]."). [8](Defendant's Mem. at 14 (citing *Maksimovic v. Tsogalis*, 177 Ill. 2d 511, 687 N.E.2d 21 (1997)).) Caterpillar suggests that since Bennington relies on the same "facts" to support both his IIED and ADEA claims that the IIED claim is preempted by the IHRA. (*See* Def.'s Mem. at 14.) A closer reading of *Maksimovic* and more recent on-point federal cases, however, leads one to the opposite conclusion.

As recently stated by a sister district court, the Illinois Supreme Court's *Maksimovic* decision clarifies how one avoids the exclusivity provision of the IHRA. *Finnane v. Pentel of America, Ltd.*, 43 F. Supp. 2d 891, 902 (N.D. Ill. 1999). *Maksimovic* makes clear that IHRA preemption "is limited to situations where the claim made is dependent on a legal duty imposed by the IHRA." *McCaleb v. Pizza Hut of America, Inc.*, 28 F. Supp. 2d 1043, 1049 (N.D. Ill. 1998). In the IHRA preemption analysis, "[t]he focus is not solely on whether there is a core of operative facts," but rather "whether there is a separate theory of redress available to the plaintiff based on duties that are not prescribed by the IHRA." *Finnane*, 43 F. Supp. 2d at 902-03;

---

[8] "[I]f an Illinois state court lacks jurisdiction to hear such a claim, so does a federal district court sitting in Illinois." *Thomas v. L'Eggs Prods., Inc.*, 13 F. Supp. 2d 806, 808 (C.D. Ill. 1998).

see also McCaleb, 28 F. Supp. 2d at 1049 ("Preemption [under the IHRA] does not apply where two claims are merely factually linked; instead the *legal* bases for the claims must be inextricably linked.") (emphasis in original). In *Finnane*, the independent legal bases for the action were the torts of negligent supervision or negligent retention, as provided by the common law. *See* 43 F. Supp. 2d at 903. In *McCaleb*, the independent legal basis for the action was the Illinois Hate Crimes Act. *See* 28 F. Supp. 2d at 1048-49. In the case at bar, the ADEA is the obvious and independent legal basis for Bennington's IIED claim. *See* 29 U.S.C. § 626(c)(1) (1999) ("Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter [the ADEA]."). Simply put, even if the IHRA did not prohibit age discrimination, the ADEA does, thereby providing a separate legal basis for Bennington's claim aside from the IHRA. *See Krocka v. City of Chicago*, 203 F.3d 507, 516-17 (7th Cir. 2000) (citing *Maksimovic*). Therefore, Caterpillar is not entitled to summary judgment on Bennington's IIED claim by virtue of preemption under the IHRA.[9]

C. Bennington Has Stated a Prima Facie Case of Intentional Infliction of Emotional Distress.

---

[9] Caterpillar's argument must fail because it relies on "the factual link rule applied by the Illinois Appellate Court in *Maksimovic*, but which was subsequently overruled by the Illinois Supreme Court in that very case." *McCaleb*, 28 F. Supp. at 1050. But *see Jansen v. Packaging Corp. of America*, 123 F.3d 490, 493 (7th Cir. 1997) (plaintiff's IIED claim "is supported by the identical factual allegations of her Title VII claims and is therefore preempted" by the IHRA).

Under Illinois law, the essential elements for an IIED claim are threefold: (1) extreme and outrageous conduct, (2) done either with intent or knowledge of a high probability that it will, (3) cause severe emotional distress. *Holder v. Ivanjack*, 39 F. Supp. 2d 965, 969 (N.D. Ill. 1999) (citing *Schroeder v. Lufthansa German Airlines*, 875 F.2d 613, 623 (7th Cir. 1989)). As Caterpillar has failed to dispute the second element of Bennington's IIED claim, only the first and third elements are in dispute. (*See* Def.'s Mem. at 15.) *Rickgauer v. Martin Marietta Materials, Inc.*, 55 F. Supp. 2d 899, 903 (C.D. Ill. 1999) (in deciding summary judgment, court must view evidence in light most favorable to nonmovant).

As a general matter, courts have had trouble attaching a precise definition to the term "extreme and outrageous," although some guidelines have been laid out. *Patterson v. Xerox Corp.*, 901 F. Supp. 274, 278 (N.D. Ill. 1995). In essence, to be extreme and outrageous for IIED purposes, the conduct must go "beyond all possible bounds of decency." *Holder*, 39 F. Supp. 2d at 970 (quoting *Schroeder*, 875 F.2d at 623). In making such a determination, the court must examine all the facts and circumstances surrounding the claim and view them cumulatively rather than separately. *Holder*, 39 F. Supp. 2d at 970. Moreover, such a determination must be made on a case-by-case basis, depending on the particular facts presented. *Schroeder*, 875 F.2d at 623. Especially relevant to the present inquiry is the fact that "[e]xtreme and outrageous conduct may be the result of an abuse of a position of power." *Holder*, 39 F. Supp. 2d at 970.

> [T]he more control which a defendant has over the plaintiff, the more likely that defendant's conduct will be deemed outrageous, particularly when the alleged conduct involves either a veiled or explicit threat to exercise such authority or power to plaintiff's detriment. Threats, for example, are much more likely to be a part of outrageous conduct when made by someone with the ability to carry them out [than] when made by someone in a comparatively weak position.

Patterson, 901 F. Supp. at 279 (quoting *McGrath v. Fahey*, 126 Ill. 2d 78, 533 N.E.2d 806, 809 (1988)). In the instant case, Bennington has alleged that his employer and supervisors were the actors for purposes of his IIED claim. *See generally* Am. Compl. As such, they were in a position of authority over him and used that power and authority to cause the extreme and outrageous conduct in this case. Therefore, Bennington has clearly identified extreme and outrageous conduct to make out a prima facie IIED claim.

Caterpillar further attacks Bennington's IIED prima facie case as lacking evidence of severe emotional distress. In its Memorandum, Caterpillar argues that Bennington's IIED claim must fail because there is no evidence indicating that Bennington suffered such severe emotional distress as to warrant hospitalization, psychiatric treatment, or prescription medication. (*See* Def.'s Mem. at 15.) However, an IIED plaintiff's injuries do "not need to result in physical injury or the threat of physical injury." *Holder*, 39 F. Supp. 2d at 969 (citing *Schroeder*, 875 F.2d at 623). Therefore, Bennington has sufficiently stated an IIED prima facie case, and Caterpillar is not entitled to summary judgment on its IIED claim. At the very least, Bennington has provided a genuine issue of material fact as to whether he stated an IIED prima facie case, therefore making summary judgment inappropriate. *See Pitasi*, 184 F.3d at 714.

V. CATERPILLAR IS NOT ENTITLED TO SUMMARY JUDGMENT ON BENNINGTON'S CLAIMS FOR BACK PAY AND FRONT PAY.

The remedial scheme provided in the ADEA is designed to make a plaintiff whole; to put him in the same financial position as he would have been absent the unlawful discrimination. *Moore v. University of Notre Dame*, 22 F. Supp.

2d 896, 903 (N.D. Ind. 1998).[10] Consequently, upon finding a violation of the ADEA, the court is authorized to afford relief by various means, including back pay. *Id.* at 903; *Syvock v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 160 (7th Cir. 1981) (ADEA back pay award is within trial court's discretion), *overruled on other grounds*, 860 F.2d 834, 836 (7th Cir. 1988). In fact, once liability is shown, a plaintiff's entitlement to an award of back pay is presumed, unless it would somehow conflict with an applicable state law. *EEOC v. O&G Spring &Wire Forms Specialty Co.*, 38 F.3d 872, 880 (7th Cir. 1994), *cert. denied*, 513 U.S. 1198 (1995). Thus, once Bennington has adequately alleged that Caterpillar violated the ADEA, he is presumptively entitled to a back pay award.

In addition to back pay, the ADEA clearly permits a front pay award based on its make whole relief provisions. *See* 29 U.S.C. § 626(b); *McKnight v. General Motors Corp.*, 908 F.2d 104, 117 (7th Cir. 1990), *cert. denied*, 499 U.S. 919 (1991); *Moore*, 22 F. Supp. 2d at 903-04; *see also United States EEOC v. Century Broadcasting Corp.*, 957 F.2d 1446, 1464 (7th Cir. 1992) (existence and amount of back pay award irrelevant to propriety of awarding front pay); *cf. Century Broadcasting*, 957 F.2d at 1464 n.19 (front pay even more appropriate in absence of liquidated damages). Generally speaking, an award of front pay is appropriate where either the employer does not offer reinstatement or the employee does not seek reinstatement. *Partington v. Broyhill Furniture Indus., Inc.*, 999 F.2d 269, 273 (7th Cir. 1993); *see also Moore*, 22 F. Supp. 2d at 903-04 (front pay award appropriate where reinstatement inappropriate due to hostility between employee and employer). Moreover, the ADEA "affords the court discretion to award front pay according to the circumstances of each case." *Downes v. Volkswagen of America, Inc.*, 41 F.3d 1132, 1141 (7th Cir. 1994). In making such a determination, "the court considers such factors as whether the plaintiff has a reasonable prospect of obtaining comparable employment, whether the time period for the award is relatively short, whether the plaintiff intended to work or was physically capable of working and whether liquidated damages have been awarded." *Id.* at 1141. As neither Bennington nor Caterpillar sought reinstatement, a front pay award would be appropriate in this case.

---

[10] Citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) (discussing equitable remedies for Title VII); *Straka v. Francis*, 867 F. Supp. 767 (N.D. Ill. 1994) (stating that ADEA and Title VII are treated similarly regarding available remedies). *But cf. McKnight v. General Motors Corp.*, 908 F.2d 104, 117 (7th Cir. 1990) (ADEA's remedial scheme is much more generous than that of Title VII), *cert. denied*, 499 U.S. 919 (1991).

In an effort to deny Bennington his back pay and front pay awards, Caterpillar alleges that Bennington failed to mitigate his damages. (*See* Def.'s Mem. at 16.) Although Bennington admittedly did not seek comparable employment *immediately* after his wrongful departure from Caterpillar (*see* Bennington Dep. at 132:22-133:7), [11]e has since actively sought other employment. (Bennington decl. at paragraph 5 and 6). Nevertheless, while a plaintiff does have a duty to mitigate his damages, it is the defendant who has the burden of proving that the plaintiff failed to do so. *Williams v. Imperial Eastman Acquisition Corp.*, 994 F. Supp. 926, 931 (N.D. Ill. 1998). Not only does the defendant have to prove that the plaintiff failed to mitigate, but the defendant must also prove that if the plaintiff would have attempted to obtain suitable employment, there were comparable jobs available. *Id.* at 931. There is no evidence in the record to indicate that Bennington has wholly failed to seek alternative, comparable employment, nor is there evidence that such employment was available to him. *See Williams v. Pharmacia Inc.*, 956 F. Supp. 1457, 1466 (N.D. Ill. 1996) (absent double recovery, defendant has burden of proving unavailability of a category of damages), *aff'd*, 137 F.3d 944 (7th Cir. 1998). Therefore, it is clear that Caterpillar has failed to adequately disprove Bennington's presumptive entitlement to back pay, as well as Bennington's requested front pay award. Thus, Caterpillar's motion for summary judgment on these issues must be denied.

---

[11] *See also Perry v. Harris Chernin, Inc.*, 126 F.3d 1010, 1015 (7th Cir. 1997) (when "conditions are beyond 'ordinary' discrimination," employee may leave his job while seeking redress).

VI. CATERPILLAR IS NOT ENTITLED TO SUMMARY JUDGMENT ON BENNINGTON'S CLAIM FOR LIQUIDATED DAMAGES UNDER THE ADEA.

The ADEA specifically provides for liquidated damages in cases of "willful" violations. *See* 29 U.S.C. § 626(b); *Trans World Airlines v. Thurston*, 469 U.S. 111, 125 (1985) ("The legislative history of the ADEA indicates that Congress intended for liquidated damages to be punitive in nature."). To establish a willful violation of the ADEA, the plaintiff must show that the defendant knew its employment decision violated the ADEA, or, alternatively, that the defendant acted with "reckless disregard" of whether or not its actions violated the ADEA. *Chiaramonte v. Fashion Bed Group, Inc.*, 129 F.3d 391, 402 (7th Cir. 1997) (citing *Thurston*, 469 U.S. at 128), *cert. denied*, 118 S. Ct. 1795 (1998). When such a willful violation is found, the ADEA authorizes liquidated damages in an amount equal to the back pay award. *Moore*, 22 F. Supp. 2d at 903 (footnote omitted).

The instant case is analogous to *Century Broadcasting*. In that case, the defendant was held to have willfully violated the

ADEA when its management did not act reasonably and in good faith in attempting to determine whether its actions would violate the ADEA. 957 F.2d at 1459-60. Although Caterpillar may have had an adequate non-discrimination policy in effect, [12]he Caterpillar management evidently chose not to abide by it in this case, as is indicated by the various factual discussions herein, and by the actions of A.J. Rassi, Vice President of Human Resources and Dan Murphy, Vice President of PEPD. *See generally* Parts I through III, *supra*. Therefore, Caterpillar is not entitled to summary judgment on Bennington's ADEA liquidation damages claim. At the very least, Bennington has demonstrated that a genuine issue of material fact exists as to whether Caterpillar "willfully" violated the ADEA, and thus Caterpillar's motion for summary judgment on this claim must be denied. *See Pitasi*, 184 F.3d at 714.

CONCLUSION

In light of the foregoing arguments and authorities, the Plaintiff James Bennington respectfully requests that this Honorable Court DENY the Defendant Caterpillar, Inc.'s Motion for Summary Judgment, with prejudice, and permit the jury to decide the disputed issues of material fact in this case.

---

[12] (*See* Bennington Dep. at 209-210; Declaration of Dearl E. Morris & Ex. 1 thereof.)

Respectfully submitted,
JAMES BENNINGTON

By: /s/ William M. Anderson IV
William M. Anderson IV, Esquire

Anderson Law Offices
625 South Main Street
Creve Coeur, IL 61610
(309) 694-6250

CERTIFICATE OF COMPLIANCE

William M. Anderson certifies that Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment complies with the District's type volume limitation for memoranda in support of motions set forth in CDIL-LR 7.1(B)(2). The text of the memorandum contains 44,936 characters.

/s/ William M. Anderson IV
William M. Anderson IV

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

JAMES BENNINGTON,	)	
	)	
Plaintiff,	)	
	)	
-vs.	)	Case No. 99-1111
	)	
CATERPILLAR, INC.,	)	
	)	
Defendant.	)	

MOTION TO RE-OPEN DISCOVERY

NOW COMES JAMES BENNINGTON, Plaintiff, by his attorney, WILLIAM M. ANDERSON IV, and in support of his Motion to Re-open Discovery in the within matter, states as follows:

1. Plaintiff does hereby move that this Court re-open discovery in the within case and establish new discovery and related deadlines.

2. That in support of Motion to Re-open Discovery, Plaintiff calls this Court's attention to Federal Rule 30.1 of the local rules of the United States District Court for the Central District of Illinois, to wit:

> Rule 30.1 - Scheduling of Depositions - In scheduling any deposition, counsel must make a good faith effort to coordinate with all opposing counsel the scheduling of a time that is mutually convenient to all opposing counsel and parties. The signing and serving of a Notice of deposition shall constitute a certification by the attorney signing and serving the Notice of

Deposition that the attorney has complied with this rule.

3. That pursuant to the above quoted Rule 30.1 regarding scheduling of depositions, the signing and serving of a Notice of Deposition shall constitute as certification by the attorney signing and serving the notice that that attorney has complied with this rule. In other words, counsel for Plaintiff was required to make a good faith effort to coordinate with all opposing counsel, the scheduling of time and date for said depositions that are mutually convenient to all counsel and parties.

4. That it is clear and apparent that Attorney William M. Anderson IV attempted to comply with this rule by repeatedly asking for available dates with opposing counsel.

5. That if Attorney William M. Anderson IV had merely noticed up all dates for all requested discovery depositions on dates that were convenient only to William M. Anderson IV, then this Court surely would have allowed said discovery to proceed forward even if said dates had been inconvenient to the defense counsel, however, this would have violated the spirit and letter of Rule 30.1.

6. As such, Plaintiff is now being prejudiced for repeatedly attempting to schedule said depositions with defense counsel.

7. That as further reason for re-opening of discovery herein, Plaintiff hereby informs the Court that at the discovery deposition of Donald Evans, taken on August 14, 2000, Donald Evans admitted, under oath, that he had changed the annual employee performance evaluation of John Kamp after said performance evaluation had been done by another supervisor and had already been through the entire sign line. In other words, Donald Evans admitted to changing an employees' annual evaluation from a good evaluation to a poor evaluation after said evaluation should have been a permanent record in the employee's history file with Caterpillar, Inc.. See pages 21

through 25 of the discovery deposition of Donald Evans taken August 14, 2000, attached hereto and incorporated herein by reference as Plaintiff's Motion Exhibit "A".

8. Donald Evans went on to claim that he did not change the performance evaluation of Jerry Siwicke. See pages 40 and 41 , pages 46 and 47 and page 58 of the discover deposition of Donald Evans attached hereto and incorporated herein by reference as Plaintiff's Motion Exhibit "B".

9. That Jerry Siwicke on many occasions prior to the deposition of Donald Evans and on one other occasion after the deposition of Donald Evans has informed Plaintiff personally that Donald Evans also changed his annual performance review after it was initially prepared by another supervisor at Caterpillar from a favorable review to an unfavorable review.

10. That these statements made by Jerry Siwicke to Plaintiff, herein, are in direct contradiction to the testimony of Donald Evans, taken on August 14, 2000.

11. That counsel for Defendant, herein, has requested that counsel for Plaintiff direct his client to have no further personal contact with Caterpillar supervisory personnel, herein.

12. That, for the above reasons, it is apparent that it is necessary and appropriate to take the discovery deposition of:

Jerry Siwicke - The fellow employee who was transferred to "waste management" after having had his performance review changed from a favorable review to an unfavorable review.

Ray Shearer - Supervisor over Plaintiff who informed Plaintiff that his work was fine and then informed Plaintiff to clean out his desk several days later and who wrote that the transfer was by "mutual agreement", when said the transfer was not by mutual agreement.

Paul Wroblewski - Plaintiff's supervisor who changed Plaintiff's performance review from a positive review to an unfavorable review similar to that action taken by Donald Evans against John Kamp and Jerry Siwicke.

13. That it is apparent that the depositions already taken have led to evidence of improper conduct by Caterpillar in changing employee reviews to justify disposing of these employees for improper reasons. In order for Plaintiff to pursue the information needed to follow up on the information obtained in the depositions of August 14, 2000, it shall be necessary to re-open the discovery deadlines, herein.

14. That Caterpillar, Inc. shall not be prejudiced by any extension of deadlines, herein, but that Plaintiff shall be severely prejudiced if not allowed to follow up on the information obtained in the August 14, 2000 depositions.

15. That Attorney William M. Anderson IV was not the original attorney for Plaintiff, herein, and Plaintiff was forced to obtain new counsel in the within case after his prior attorney, Dean Poignant, left the practice of law. This has deprived JAMES BENNINGTON's new counsel from having the normal amount of time to prepare and obtain a full understanding of the litigation prior to even filing a lawsuit and, further, that Attorney William M. Anderson IV has diligently attempted to come up to speed in this litigation and represent this Plaintiff to the best of his ability.

WHEREFORE, Plaintiff, by his Attorney, William M. Anderson IV, respectfully requests that this Court re-open the discovery and "monitor" this discovery as stated in this Court's Order entered July 13, 2000 by Chief Judge Joe B. McDade and, further, that the remaining discovery depositions of the above referenced Caterpillar employees be allowed to be conducted on a single date certain and for such other and further relief as this Court deems appropriate.

Respectfully submitted,

/s/ William M. Anderson IV
WILLIAM M. ANDERSON IV
Attorney for Plaintiff

STATE OF ILLINOIS)
) SS.
COUNTY OF TAZEWELL)

I, WILLIAM M. ANDERSON IV, first duly sworn on oath, depose and say that I have read the above Motion to Reopen Discovery; that the statements and facts contained therein are true and correct to the best of my information and belief.

/s/ William M. Anderson IV
WILLIAM M. ANDERSON IV

Subscribed and sworn to before me this ____ day of September, 2000.

/s/
Notary Public

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

I, JIM BENNINGTON, first duly sworn on oath, depose and say that I have read the above Motion to Re-open Discovery; that the statements and facts contained therein are true and correct to the best of my information and belief.

/s/ Jim Bennington
JIM BENNINGTON

Subscribed and sworn to before me this ____ day of September, 2000.

/s/
Notary Public

ANDERSON LAW OFFICES
William M. Anderson IV
625 South Main
Creve Coeur, Illinois 61610
Telephone: (309) 694-6250

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

JAMES BENNINGTON,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 99-CV-1111
	)	
CATERPILLAR, INC.,	)	
	)	
Defendant.	)	

DECLARATION OF JERRY B. HOLLOMAN

JERRY B. HOLLOMAN, having been duly sworn, on oath deposes and states that if he were called to testify in the above captioned matter, that he would be competent to testify to the following facts based upon his personal knowledge, and that these facts are true and correct:

1. I am currently retired from employment with Caterpillar, Inc. and I worked for Caterpillar, Inc. for approximately 39 years and retired on or about mid-December, 1997, with an official retirement date of January 1998 for official paperwork purposes after calculating in my accumulated vacation times, etc.

2. I had been employed by Caterpillar, Inc. as a manager since 1965 and as a factory manager since approximately 1985.

3. From approximately January 1989 through September 1989, I was a factory manager in Building B at the Mossville facility.

4. Jim Bennington was a superintendent who was under my supervision from January of 1989 through September

1, 1989 in Building B. The attached salaried exempt employee profile and written comments attached thereto are the review which I prepared regarding Jim's performance during his time in 1989 when he was under my supervision and said employee profile accurately reflects my review of his performance at that time, see Exhibit 1 attached hereto.

5. That on or about September 1, 1989, Jim was transferred from my supervision to another supervisors supervision because of an opening in Building BB where Jim's skills were more needed at that time. This was a lateral move and not a promotion or demotion at this time.

6. That the next time that Jim Bennington worked under my supervision was in early 1995 after a reorganization at Caterpillar, Inc. which occurred at the end of 1994 or early 1995.

7. In early 1995, I was the machine shop manager for the Mossville complex with responsibility over Buildings BB, DD, and B.

8. At this time, Jim was still a superintendent but Caterpillar, Inc. had changed the nomenclature of his position to that of a "unit manager". The unit manager position carried more responsibility and was effectively a promotion in place with a grade level increase in pay. Jim was at that time working in Building BB.

9. During this period in 1995, I was supervising approximately seven unit managers across three shifts and Jim Bennington was one of those unit managers.

10. 1995 was a year of extended strike by the unions at Caterpillar, Inc. and severe manpower problems were experienced.

11. Attached hereto and made a part hereof by reference is the annual performance review of James Bennington that I prepared and signed for the period of January through December, 1995, and said review accurately reflects

my evaluation of Jim Bennington's performance, see exhibit 2 attached hereto.

12. In early 1996, there was another reorganization at Caterpillar, Inc. and my responsibilities were changed from being a machine shop manager for three different buildings at the Mossville complex to the responsibility of being a manufacturing operations manager for all operations in Building DD. This change in responsibility was a lateral move and not a promotion or demotion.

13. On or about January, 1997, I called Jim Bennington into my office with a job offer for Jim to come to work for me as a unit manager in Building DD where he would be responsible for "assembly and test" for two engine assembly lines.

14. I was looking for a new unit manager for these assembly lines because of the fact that the prior unit manager, Al Sabin, had moved to the Caterpillar Greenville plant.

15. Jim Bennington accepted my offer and left Building BB and came to work for me in Building DD on or about January, 1997.

16. Jim did an excellent job of running the two engine assembly lines for which he was responsible and had these lines running efficiently.

17. In June or July of 1997, Charles Gene Duchardt retired. One of Charles Gene Duchardt's responsibilities was the commercial engine assembly area. Upon the retirement of Charles Gene Duchardt, it was identified that a serious problem existed in the commercial engine assembly area.

18. I determined that commercial engine assembly was seriously past due and not meeting production schedules and was about to become even further past due in production schedules.

19. Among the problems which were experienced at that time included the fact that planning and tracking systems which were in place for these assembly lines in a previous

building were not working for the new assembly lines in the new building.

20. At this time, we were attempting to accomplish substantial reduction of the time it took to produce and assemble commercial engines.

21. In June or July of 1997, I assigned Jim's previous responsibilities to another unit manager and requested that he take on the new responsibility of going to the commercial engine assembly area and fixing the problems which Jim and I, working together, had identified in the commercial engine assembly area.

22. This new job which I gave Jim Bennington in June or July of 1997 was a new responsibility which I placed upon Jim Bennington because I felt that he was the best man available to take on the responsibility of bringing the commercial engine area up to appropriate standards.

23. Jim Bennington and I both recognized serious problems in this commercial engine area and knew that it would take some time and effort by a qualified experienced unit manager to make the changes which were needed.

24. Among the problems which Jim Bennington and I identified in the commercial engine assembly area were that planning and tracking systems from the old building did not translate well to the new building assembly area. This was also complicated by the fact that we were in the process of substantially reducing the time it would take to produce an engine when we changed the assembly from the old building to the new building.

25. It was understood by both myself and Jim Bennington that there were serious problems in meeting the production schedule and that these problems would not be easily fixed in the commercial engine area.

26. Jim Bennington had responsibility as a unit manager for this commercial engine area from June or July of 1997 through my retirement in mid-December, 1997.

27. Jim Bennington and I had regular communication and discussion during the last half of 1997 and worked closely together in accomplishing the very difficult job of bringing this area up to meeting production schedules and shipping dates.

28. During the last half of 1997, Jim Bennington or his staff constantly communicated daily with the commercial sales division to make sure that the customers were kept happy and that the division met the most important demands of the customers and that the correct and appropriate priorities were set while we were attempting to bring the commercial area up to speed.

29. By October of 1997, Jim Bennington had brought the commercial area up to speed and the ready to ship dates were consistently met from October through the end of my employment with Caterpillar.

30. In December, 1997, I had a meeting with Jim Bennington and was discussing his annual performance review with him at which time I thanked him for his performance in getting the commercial engine area current. Jim Bennington responded with words to the effect that he only wished that he could have gotten it done sooner. I recall that my response to this statement by Jim Bennington was "Jim, no one could have done it any better".

31. As Jim Bennington's supervisor, I was also responsible for the commercial engine area and I received a favorable review at the end of the 1997 year.

32. I prepared all of the employee annual evaluations and performance reviews for the employees under my supervision and turned these evaluations and performance reviews in to my supervisor, Paul Wroblewski, in December of 1997 and Paul Wroblewski did not inform me of any problems he had with any of the annual evaluation performance reviews which I prepared for my employees.

33. It would be normal practice for Paul Wroblewski to inform me if he had a problem with a review I had submitted to him for his approval.

34. Among the annual performance reviews that I submitted to Paul Wroblewski was the annual performance review of James Bennington, a copy of which is added hereto and made a part hereof, which review is for the period from January through December, 1997, see exhibit 3 attached hereto.

35. That my review would have originally been typed on or about November 26, 1997, as reflected by the date and time stamp contained in the lower right had portion of each page of said review.

36. Jim Bennington executed said annual performance review on or about November 26, 1997, and I executed said performance review on or about December 8, 1997.

37. Said performance review of James Bennington for the period of January through December, 1997, was apparently changed some time after December 8, 1997, without my advice, consent or knowledge as reflected by the December 18, 1997 date which appears in the bottom right hand corner of pages one and two of said performance planning review of Jim Bennington for January through December, 1997, and as reflected by the supplement to said performance review, which supplement was not contained in the performance review when I executed it on December 8, 1997.

38. Additionally, the performance review of Jim Bennington for the period of January through December of 1997 has been changed in the areas of accountability, leadership, and teamwork/cooperation. It also appears that the words "I was told to initial the changes and I have done so. JRB" were also added to said performance review on page five of said performance review sometime after December 8, 1997. Beside each area where boxes are checked on Jim Bennington's annual performance review, prepared at the end of 1997, I had

an explanation typed in place for each area where a box is checked.

39. In said 1997 performance review of Jim Bennington, it appears that the initial favorable boxes I had checked were changed to a much less favorable box and the typed statement which I gave to explain the evaluation in each area was changed to an unfavorable handwritten evaluation in the areas of accountability, leadership, and teamwork/cooperation.

40. Based upon my daily supervision of Jim Bennington and his performance while an employee for me during the year of 1997, I am of the opinion that the changes made in his annual performance evaluation are not an accurate reflection of the work he performed during the year 1997. It is my opinion that the January through December, 1997 performance review of Jim Bennington, as originally written by me, is the correct and accurate evaluation of his performance for the year 1997.

41. I am of the opinion that it would not be consistent, based upon my experience and training at Caterpillar, Inc. in performing employee reviews, to give an employee such low scores on areas such as accountability and yet give an employee such an exceptional score in areas such as decision making. In other words, I do not find it consistent that the lowest possible score was given to Jim Bennington for accountability and yet the highest possible score was given to him for decision making ability. I also am of the opinion based upon my experience and training, that it is inconsistent to give an employee an exceptional score for "judgment" as Jim received in his 1997 evaluation, and then give extremely poor scores in leadership, accountability and teamwork/cooperation.

42. Based upon my experience at Caterpillar, Inc., an annual performance review such as exhibit 3 attached hereto, i.e. the modified 1997 performance review of Jim Bennington,

would have been an extreme detriment to Jim Bennington's ability to find work within the Caterpillar, Inc. organization.

43. The normal procedure for a supervisor looking to hire a new unit manager would be to look at the personnel history folder of that employee and the annual performance reviews are maintained in chronological order so that the first thing a supervisor would see when looking at the history folder would be the last years annual performance review.

44. A supervisor would not normally want to hire a unit manager who was not accountable, had poor leadership skills and poor teamwork/cooperation skills.

45. Many of the items to be evaluated in an employee annual performance review are interrelated and I find the changes which were made in Jim Bennington's performance review are not consistent with the remainder of said performance review, as modified after my signature of December 8, 1997, and I hereby state that I am of the opinion that said changes, made after my signature, do not accurately reflect Jim Bennington's performance as my employee.

46. Based upon my experience and training at Caterpillar, Inc. and my experience as a supervisor of Caterpillar, Inc. employee, Jim Bennington, it is my opinion that Jim Bennington understood what it took to run a factory operation and how to maintain costs and be efficient as a manager.

47. I recall that at one time I made the statement to Jim Bennington to the effect that he was "one of the best machine shop superintendents I had ever seen". I still stand by said statement.

48. I am aware of no performance related reason why the annual performance review of James R. Bennington for the period of January through December of 1997 would have been changed from my original review when I signed said document on December 8, 1997.

49. I have no personal relationship with Jim Bennington outside of our past mutual employment at Caterpillar, Inc. and we have never socialized outside of work in any fashion. I have not been paid for this declaration and all statements contained therein are the truth and are based upon my personal knowledge and experience.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this ___ day of September, 2000.

/s/ Jerry B. Holloman
JERRY B. HOLLOMAN

Subscribed and sworn to before me this ____ day of September, 2000.

/s/ ____________________
Notary Public

CATERPILLAR PDP Performance Planning/Summary

Name: James R. Bennington
Ident: 74492
Review Period: January to December 1997
Reviewer: J.B. Holloman

Job Title and Scope:
Jim is a Unit Manager in the Assembly area in building DD. For the first half of the year, he was responsible for shipping of all engines plus Assembly and Test of the 3100 Series Engines (3114, 3116, 3117 and 3196). His assignment changed in June with the closing of building B and the Commercial Engines moving to building DD. He was asked to take responsibility for all phases of the Commercial Engines and retain Shipping.

Job Goals and Results:
I. Cost
Results: Total expense through the first half of the year was $281,825 favorable to the budget. $10,192.784 budget vs. $9,910.959 actual. Total hourly ratio was also better than budget with a 1.947 budget and an actual of 1.895. These two tough goals were both better than last year and they made a substantial contribution to the building results.

II. Quality
Results: The goal was to reduce defects to 2.5/1000 for OEM's. Actual results were 47/1000 for 3114/16 and 15/1000 for 3176. These were very tough goals but customer satisfaction is of utmost importance and improvement needs to continue until these defect levels are achieved.

III. Timeliness

Results: 0% past due for Morton Parts orders over 60 days and 5% past due greater than 30 days. Jim accomplished both of these with zero past due for both categories the entire year.

The goal for the Commercial engines was to get current on past due engines, meet ship dates and RTS 95% of all engines on time. This area went from an average of two weeks past due on all engines and up to five weeks late on some at mid-year to current on all engines in October.

IV. Assets

Results: 3X improvement in inventory accuracy with a goal of 2.5% gross and .5 net actual 12.0 gross and 1.9 net. The largest single problem was due to an adjustment of one million dollars on 3176 cylinder block part number 610887.

Hourly attendance: goal of 2.8% controllable actual 2.5%

Safety - Goal	NIF 269	RIF 10.32	ISI .454
Actual	NIF 354	RIF 22.49	ISI .771

Additional information (optional):

Jim was a member of the Crosby Assembly Team for building DD. He was active in the team that identified and implemented $240K savings on the C10/12 Assembly line. As of June 1, he was relieved of that team responsibility to concentrate on commercial engine production.

There are no 8D teams of FEMA activities being used in the commercial area. These are tools that need to be stressed and utilized for further improvement. These innovative tools need to be part of the '98 improvement plan.

The commercial engine move from B to DD caused RTS and ship dates to suffer badly. The move took place in (3) phases. Marine, Industrial, and EPG. At the same time, process times were reduced. Jim's area was not able to get to 90%+ RTS and be current and did not meet the June or September promise dates. Once the move was complete and realistic process times instilled, the area met the October 6 deadline and has maintained a high level of RTS and kept current. The lesson learned is that "make realistic promise dates and make the date".

ACCOUNTABILITY: The extent to which one can be considered dependable and responsible for starting, controlling and concluding job tasks and assignments.

☒ PEW JRB ☐	☐	☒ ☐
Takes little or excessive risks; frequently makes incorrect decisions; won't accept responsibility for outcomes.	Takes some risk and makes decisions required of the job accepts responsibility for outcome.	Takes prudent risk when making decisions, willingly accepts total responsibility for outcomes.

Explain the ~~Willingly accepts responsibility for his assignment~~ evaluation: and the results. Jim avoids taking responsibility for his results, Commercial MEA is an example.

ANALYSIS: The ability to identify and respond to complex situations, relate and compare data from different sources, identify issues, secure information, and identify relationships.

☐	☐	☐	☒	☐
Does not obtain nor evaluate pertinent information to prevent work-related problems.		Gathers work-related information, makes associations and uncovers problems.	Especially effective at gathering information, makes proper associations and comparisons to uncover problems.	

Explain the evaluation Gathers information from available sources and does a good job of analyzing it before putting a plan into action.

COMMUNICATIONS: The ability to convey and absorb job-related information.

☐	☐	☒	☐	☐
Communications are unclear, errors occur frequently ideas are disorganized; does not listen effectively.		Communications are generally clear, to the point, logical and complete. Listens effectively.	Exceptionally concise. Adapts style to the audience. Easily communicates with people of diverse backgrounds. Listens very effectively.	

Explain the evaluation His communication is clean and concise. He writes well and communicates openly with his boss. He is a good listener.

CUSTOMER FOCUS: Helping others meet their goals.

☐	☐	☐	☒	☐
Customers complain about untimeliness and poor quality of products /services provided and are unable to achieve goals.		Customers are generally pleased with the availability responsiveness convenience and timeliness of the product/services provided and alignment with goals.	Customers are extremely complimentary of the products/ services provided and are able to achieve goals.	

Explain the evaluation He is quick to respond to customers needs. He helps others to accomplish their goals.

DECISION-MAKING: The ability to use logical and sound judgment: in choosing a particular course of action after generating prudent alternatives.

☐	☐	☐	☐	☒
Often does not obtain or evaluate pertinent information and/or puts off making decisions with facts at hand.		Seeks appropriate information necessary for decisions, makes timely decisions considers best information available.	Consistently makes sound, timely decisions exceptional at obtaining and evaluating information and considering long-term effects.	

Explain the he evaluation He doesn't hesitate to make sound decisions and is very consistent in making correct decisions.

DELEGATION: The practice of assigning and directing tasks.

☐	☐	☐	☒	☐
Ineffective use of delegation results in work not being completed on time and/or being of poor quality.		Uses the skills abilities and knowledge of employees to meet job requirements and complete assigned tasks.	Extremely effective at assigning and directing tasks and completing job priorities through the use of delegation.	

Explain the evaluation	He's effective at delegating and his follow-up is fully effective.

INITIATIVE: The power, ability or instinct to begin or follow through energetically with a plan or task.

☐	☐	☐	☑	☐
Does not attempt to influence. Takes action or follows through only when instructed.		Attempts to influence Takes action or follows through to meet job requirements.	Actively attempts to influence events. Takes action beyond what is called for, consistently originates or follows through with action.	

Explain the evaluation	He works to create an atmosphere for his work group that brings out their initiative.

INNOVATION: The act of starting or introducing original concepts or creative ways to achieve goals.

☐	☐	☐	☑	☐
Does not suggest or implement improved methods for achieving goals. goals.		Generally introduces and implements creative solutions to problems to achieve goals.	Consistently implements creative solutions to problems. Is exceptional at recognizing innovative applications to meet or exceed goals.	

Explain the is evaluation	Normally does things in a traditional manner but innovative when innovation is needed for improvement.

NTERPERSONAL SKILLS: The manner in which people deal with others in carrying out their responsibilities.

☐	☐	☑	☐	☐
Does not work effectively with others. Behavior is disruptive.		Maintains proper working relationships with others. Is cooperative, tactful and respects the needs and feelings of others.	Extremely effective in dealing with others highly respected.	

Explain the evaluation	He is tactful at all times when dealing with others.

JUDGMENT: The ability to make a decision or form an opinion by discerning and evaluating information.

☐	☐	☐	☐	☒
Rarely considers alternative courses of action; often makes incorrect decisions, puts off decision making.		Generally considers alternative courses, makes decisions required for the job decisions are generally correct.	Consistently considers alternative courses of action and makes correct decisions. Is exceptional at considering the long-range impact on business goals.	

Explain the evaluation His judgment is excellent. He is able to draw from his past experiences and combines that with today's needs to make good sound decisions.

LEADERSHIP: Utilization of appropriate interpersonal skills and methods in guiding individuals or groups toward goal accomplishment.

☐	☒ PEW JRB	☐	☐	☒
Lack of leadership results in unacceptable quality and/or quantity of work. Work group behaviors are unacceptable.		Generally effective in use of leadership skills. Work group meets requirements for quality and quantity of work.	Consistently supports others to produce both high quality and quantity of work and achieves or exceeds goals.	

Explain the evaluation ~~His group looks to him as a leader instead of just the boss.~~

Inventory accuracy, quality, safety and expenses don't meet requirements.

MANAGING DIVERSITY: The ability to maintain effectiveness and to interact with people (or teams of people) with differing opinions and backgrounds.

☐	☐	☒	☐	☐
Is ineffective in working with or or in a diverse work force. Behavior is disruptive and unacceptable. Does not meet goals.		Effectively works with a diverse work force and meets goals.	Exceptionally effective in working with a diverse work force and in understanding and taking action to achieve goals.	

Explain the evaluation Seems to be at ease with people of different background or opinion.

PEOPLE DEVELOPMENT: Supporting and encouraging others to achieve their full potential.

☐	☐	☐	☒	☐
Ineffective use of coaching and feedback; does a poor job of developing others.		Competent in increasing the effectiveness of others.	Displays high level of competence in increasing the effectiveness of others to achieve their full potential.	

Explain the evaluation	He works to develop his employees and has two employees ready to accept more responsibility.

PLANNING AND ORGANIZATION: Arranging events and projects in an efficient, orderly manner.

☐	☐	☐	☒	☐
Does minimal planning, Does not consider goals or priorities.		Develops work plans. Exhibits daily work behavior consistent with work goals and priorities	Plans work in an exceptional manner. Defines goals clearly; anticipates and plans for potential problems. Follows up effectively.	

Explain the evaluation	Always well organized and works to a well developed plan.

TEAMWORK/COOPERATION: Working with others to achieve a common goal.

☐	☒	☐	☒	☐
Behaviors cause conflict within team and/or work group resulting in the team/work unit goals not being achieved.		Participates effectively as a team leader and/or member. Works effectively in the work group.	Extremely effective as a team member and/or leader Very effective in the work group.	

Explain the evaluation	~~Works well with others and is considered a team player by his peers.~~ Jim blames others for his failures. Team initiative is minimal.

TECHNICAL/PROFESSIONAL KNOWLEDGE: The comprehension of discipline specific information acquired through study, certification or experience.

☐	☐	☐	☒	☐
Knowledge is limited to certain areas, insufficient to handle many tasks. Requires frequent help and supervision.		General knowledge is sufficient to handle required tasks. Competent when using routine techniques.	Displays exceptional knowledge and know-how sufficient to handle even the most complex assignments.	

Explain the evaluation	This is his first year on this assignment. He is continuing to grow and learn.

WORK STANDARDS: The various expectations placed upon individuals and the organization to ensure highest productivity and job satisfaction.

☐ ☐ ☐ ☑ ☐

Does not accept responsibility for high level of productivity. Often produces work of unacceptable quality.	Accepts responsibility for and generally produces quality work.	Seeks responsibility for and consistently produces high quality work.

Explain the evaluation: Expects a full days work for a fair days pay from himself and from others on his team.

ADDITIONAL CHARACTERISTIC (Optional): (Type name & definition below)

☐ ☐ ☐ ☐ ☐

Explain the evaluation

Employee Signature

My signature indicates only that I have read the above review and discussed it with the reviewer. It does not imply that I agree or disagree.

Acknowledged /s/ James R. Bennington

Date 11/26/97

Employee
Comments (Optional) I was told to initial the changes and I have done so. JRB

Development Planning Meeting occurred on 4/15/97

Reviewer /s/ J.B. Holloman Date: 12/8/97

Also Reviewed By:

Reviewer ______________________ Date:__________
Reviewer ______________________ Date:__________
Reviewer ______________________ Date:__________